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90-1534

No. _____

Supreme Court, U.S.
FILED
APR 4 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GIL HOLLINGSWORTH,

Petitioner,

v.

THE STATE OF TEXAS,
GARRY MAURO, IN HIS CAPACITIES AS
COMMISSIONER OF THE GENERAL LAND OFFICE
AND CHAIRMAN OF THE BOARD FOR LEASE OF
UNIVERSITY LANDS, AND THE BOARD FOR
LEASE OF UNIVERSITY LANDS,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Gil Hollingsworth,
Pro Se

P. O. Box 10592
Midland, Texas 79702
915-699-0511

QUESTIONS PRESENTED

1. Can the STATE OF TEXAS and it's administrative agencies ignore statutes promulgated and adopted by it's own legislature manadating administrative procedures to govern the conduct of state agencies in their dealings with the citizens of the State and United States.

2. Can a party to a lawsuit get a fair and impartial hearing when the opposing party makes an ex parte communication with the court by a letter making accusations which were not included in the trial record and not giving the first party an opportunity to respond to the letter before the court ruled.

LIST OF PARTIES

1. Gil Hollingsworth, a resident of Midland, Texas is the petitioner in this case.

Petitioner was a defendant in the trial court under the allegations of a petition filed against him by GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

2. Petitioner Gil Hollingsworth is acting as his own counsel Pro Se.

3. Respondents consist of THE STATE OF TEXAS, GARRY MAURO, in his capacities as Commissioner of the General Land Office and Chairman of the Board for Lease of University lands, and the Board for Lease of University Lands.

4. Respondents are represented by the Attorney General of Texas, Dan Morales, and assistant Attorney General, Jose Manuel Rangel.

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IN THE
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GIL HOLLINGSWORTH,

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v.

THE STATE OF TEXAS,
GARRY MAURO, IN HIS CAPACITIES AS
COMMISSIONER OF THE GENERAL LAND OFFICE
AND CHAIRMAN OF THE BOARD FOR LEASE OF
UNIVERSITY LANDS, AND THE BOARD FOR
LEASE OF UNIVERSITY LANDS,

Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF TEXAS

Petitioner Gil Hollingsworth, respectfully urges that this Honorable Court grant this Petition for WRIT OF CERTIORARI, seeking review of a denial of an application for WRIT OF ERROR OF THE SUPREME COURT OF TEXAS filed December 5, 1990, for which petitioner

Gil Hollingsworth's motion for rehearing of the APPLICATION for WRIT OF ERROR was overruled January 9, 1991.

OPINIONS BELOW

The Order of the Supreme Court of Texas dated December 5, 1990, Case No. C-9715 denying petitioner's Application for Writ of Error, appears as Appendix A. The subsequent order of the Supreme Court of Texas Dated January 9, 1991, denying petitioner's motion for rehearing of the Application for Writ of Error, appears as Appendix B. The opinion in the COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT AUSTIN, TEXAS; dated December 6, 1989, STATE, ET AL VS. GIL HOLLINGSWORTH, ET AL, No. 3-89-066-CV, and reported in 784 S.W.2d. 461. Appears as Appendix C. (Petitioner's motion for rehearing was overruled on February 28, 1990.)

The judgment of the District Court of Travis County, Texas, 201st Judicial District No. 344,540-A filed December 13, 1988, appears as Appendix D.

JURISDICTION

The denial of the Application for Writ of Error in the Supreme Court of Texas, Appendix A, was entered on December 5, 1990. Petitioner's motion for rehearing of Application for Writ of Error, Appendix B, was overruled on January 9, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The fifth amendment, United States Constitution, which provides: "No person shall ... be deprived of life, liberty, or property, without due process of law."

2. The fourteenth amendment, Section 1, United States Constitution, which provides: No state shall ... enforce any law which shall abridge the privileges or immunities of Citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law.

3. Article 1 § 19 Constitution of the State of Texas, which provides:

No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land.

4. The Statute under which petitioner perfected property rights was Subchapter G of Chapter 52 of the Natural Resources Code, TEX. NAT. RES. CODE § 52.221 to § 52.252 which provided more specifically as follows:

§52.222 Application for Prospect and Development of Surveyed Land.

(a) A person who desires to obtain the right to prospect for and develop oil and gas on surveyed land shall file with the County Clerk of the County in which the tract or a portion of the tract is located or with the County Clerk of the County to which the County is attached for judicial purposes a written application which designates the land sufficiently to identify it.

(b) On receiving $1 as a filing fee, the County Clerk shall file and record the application and shall note the filing and recording together with the time of filing on his record of

surveys opposite the entry of the proper survey.

(c) The application shall be filed with the land office within 30 days after it is filed with the County Clerk"

§52.225 Filing Documents and Issuing Permits

(a) When the commissioner receives an application that was filed with the County Clerk or surveyor, the field notes and plat, a $1 filing fee plus 10 cents an acre for each acre for which application is made, and an affidavit made by the applicant indicating interests he has in any other permit, lease, or patent issued under this subchapter and in good standing, he shall file these

documents.

(b) If examination of the application and the field notes are found to be correct and the area for which application is made is covered by the provisions of this subchapter, the commissioner shall issue to the applicant or his assignee a permit conferring on him an exclusive right to prospect for and develop oil and gas within the designated area for a period of not more than two years.

5. §6252-13a Administrative Procedure and Texas Register Act.

Section 1. It is declared the public policy of this state to afford minimum standards of uniform practice and procedure for state agencies, to

provide for public participation in the rulemaking process, to provide adequate and proper public notice of proposed agency rules and agency actions through publication of a state register, and to restate the law of judicial review of agency action.

Section 13. (a) In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice of not less than 10 days.

6. Code of Judicial Conduct Canon 3A(5) which provides:

A judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider ex parte or other private communications concerning the merits of a pending or impending judicial proceeding.

7. Code of Judicial Conduct, Canon 8B which provides:

The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court, ...

STATEMENT OF THE CASE

This is a statutory construction and administrative procedure case which concerns the validity and effect of applications for permits to prospect for and develop oil and gas on lands owned by the State of Texas. (Hereafter TR refers to Trial Record, SF refers to Statement of Facts, and Supp. SF refers to Supplemental Statement of Facts.)

The applications in question were filed by Petitioners Gil Hollingsworth and Bryce Evans in 1983 with the Land Commissioner of the State of Texas, Respondent Garry Mauro, pursuant to the provisions of Subchapter G of the Texas

Natural Resources Code, TEX.NAT.RES.CODE §§52.221 et seq., which was repealed by the Legislature shortly thereafter. The Land Commissioner refused to file the applications on the sole alleged ground that the provisions of Subchapter G were invalid statutes and accordingly did not obligate him to issue permits pursuant to their terms. The Land Commissioner wrote Petitioner a letter denying the permits. See Appendix G.

When Petitioners, along with a number of other permit applicants, refused to withdraw their applications, the Land Commissioner filed this declaratory judgment suit in Travis County on February 10, 1983. (TR3) Commissioner Mauro brought the suit against approximately 30 persons who had submitted applications with the General Land Office for permits to prospect for

oil and gas on various tracts of state land under the provisions of Subchapter G. He sought a declaratory judgment that Subchapter G was invalid and without force or effect even prior to its repeal, and that he was therefore not required to issue permits to the applicants, including Petitioner.

Two of the other applicants, Ray Allen and Jacqueline Allen, filed a plea of privilege, and the case against them was transferred to Midland County. It was tried and appealed and resulted in a judgment adverse to the Allens. See Allen v. Mauro, 733 S.W.2d 228 (Tex. App. -- El Paso 1986, writ ref'd n.r.e.).

The case filed by Respondent Mauro against the other applicants remained in Travis County, but all other Defendants except Petitioners Gil Hollingsworth and

Bryce Evans entered into agreed judgments of dismissal. Petitioners filed answers denying Commissioner Mauro's allegations, and also filed counterclaims seeking a declaratory judgment that Subchapter G was valid and effective prior to its repeal, and that the terms of the statute expressly created a mandatory duty on the part of the Commissioner to accept and file Petitioners' permit applications and to issue prospecting permits on the designated tracts of land. (TR 8, 11, 15, 18)

The case between Respondent Mauro and Petitioners Hollingsworth and Evans proceeded to a non-jury trial before Judge Hume Cofer on December 15, 1987. At the trial, Judge Cofer, on his own motion, raised for the first time a concern about whether the district court

might be without jurisdiction to hear the dispute because of the lack of pre-suit compliance, or any attempt by Commissioner Mauro to comply, with any of the provisions of the Administrative Procedure and Texas Register Act (APTRA), TEX.REV.CIV.STAT.ANN. art. 6252-13a. (SF 17-23)

Early in the trial of this case, and before Respondents had amended their pleadings post-trial in include the cloud-on-title claim, Judge Cofer on his own initiative accurately summed up the fundamental flaw in Respondents' case:

> How does it happen that before any decision by the Commissioner the court should be asked to intervene in the activities of the Commissioner? If the legislature has delegated to the Commissioner the responsibility to decide these

matters, how does it happen that it be in court before he decided it? (SF 18-19)

Respondent Mauro's counsel admitted at the trial of the present case that the General Land Office is an agency subject to the requirements of APTRA. (SF 18) That being so, Petitioners were entitled to a proper administrative hearing under APTRA.

Judge Cofer explicitly recognized that the Commissioner had failed to comply with either his statutory duty under Subchapter G or the procedural requirements of APTRA. The judge noted that the question of jurisdiction was the "threshold issue that stands out like a flashbulb," and that he did not have jurisdiction to give "advisory opinions" to Commissioner Mauro on matters committed to the Commissioner by

law. (SF 19-20)

Judge Cofer took the matter under advisement. (SF 79)

Months after the trial, on June 22, 1988, Commissioner Mauro filed the "Plaintiffs' Third Amended Original Petition," adding as Plaintiffs the State of Texas, the School Land Board, the Board for Lease of University Lands, and the Board for Lease of the Department of Corrections, and claiming for the first time that Petitioners' filing of their applications for permits to prospect on state lands in various county clerks' offices (as required by Subchapter G) created a cloud on the state's title to the lands in question. (TR 407)

Due process as guaranteed by the Constitution of the State of Texas and the United States was raised at the

trial court by petitioner's, DEFENDENT GIL HOLLINGSWORTH'S FIRST AMENDED ANSWER. Appendix F. Allegations of violation of due process were denied by the Trial Court. Appendix D.

Petitioners then filed additional pleadings alleging, inter alia: (1) that Commissioner Mauro had not complied with nor made a proper "final decision" under APTRA, and that the district court therefore lacked jurisdiction over the alleged declaratory judgment action; and (2) that Commissioner Mauro was estopped to deny Petitioners' applications for permits under Subchapter G. (TR 390, 403)

On December 13, 1988, Judge Cofer signed a final judgment, declaring that Petitioners' applications were "null and void," and that they were ordered "removed as a cloud on the title of any

of Plaintiffs' oil, gas and/or other minerals..." (TR 420)

Petitioners timely requested findings of fact and conclusions of law. (TR 416) None were timely filed, but finally, on May 19, 1989, Judge Cofer filed conclusions of law. (Supp. TR 2)

Petitioner Hollingsworth raised due process as guaranteed by the Constitution of the State of Texas and the United States as Point of Error No. 3 as recited in the Third Court of Appeals Opinion, Appendix C, page 14. Petitioner's allegations of violation of due process were denied by the Third Court of Appeals. Appendix C, page 33

On December 6, 1989, the Austin Court of Appeals affirmed the judgment for Commissioner Mauro and the State. Petitioners' motion for rehearing was overruled on February 28, 1990.

Appendix C. Petitioner timely filed an Application for Writ of Error with Supreme Court of Texas. Petitioner raised due process as guaranteed by the Constitution of the State of Texas and United States as Point of Error No. 2 in his Application for Writ of Error at the Supreme Court of Texas. Although represented by Counsel, on November 30, 1990, commissioner Mauro mailed a letter directly to the Supreme Court of Texas making accusations which were not in the Trial record urging the Court to Act. Appendix H. The Supreme Court of Texas denied petitioner's Application for Writ of Error on December 5, 1990. Petitioner was not allowed to respond to or answer the accusations prior to the Court's ruling. Appendix A. Allegations of violation of due process were denied by the Supreme Court.

Appendix A.

Petitioner filed a motion for rehearing of the Application for Writ of Error and motion to sever with the Court. The Supreme Court overruled the motion for rehearing of the Application for Writ of Error and the Motion to Sever on January 9, 1991. Appendix B.

On January 18, 1991 Commissioner Mauro wrote a letter to the Supreme Court absolving Petitioner of any wrong doing. Appendix I.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

ARGUMENT I.

THE HOLDING BELOW IS INCONSISTENT WITH OTHER DECISIONS REGARDING DUE PROCESS OF LAW ACCEPTED BY THIS COURT

This Court accepted the reasoning of the Fifth Circuit in City of Dallas v. Southwest Airlines Company 371 F. Supp. 1015, affirmed 494 F.2d 773, rehearing

denied 496 F.2d 1407, Certiorari denied 95S.Ct 668, 419 U.S. 1079, 42 L.Ed.2d 674, rehearing denied 95S.Ct. 837, 420 U.S. 913, 42 L.Ed.2d 845, (1973) that where a party had never been accorded either notice or hearing with respect to agency orders application of orders by the agency to the party would be a violation of the Administrative Procedures Act, and the Fifth and Fourteenth Amendments to the United States Constitution.

This Court also accepted the reasoning of the Fifth Circuit in Arzanipour v. I.N.S., 866 F2d 743, rehearing denied Certiorari denied 110 S.Ct. 63 107 L.Ed.2d 30, (1989) that the failure of an agency to follow its own regulations is not, however, a per se denial of due process unless the regulation is required by the Constitution or

a Statute.

In the instant case a hearing is required by Statute, namely the Administrative Procedure and Texas Register Act § 6252-13a, Section 13.(a).

> Constitutional due process requires an administrative agency to accord a full and fair hearing on all disputed fact issues critical to the rights of the parties. Article 6252-13a, §13(a), Vernon's Tex.Civ.St.; Richardson v. City of Pasadena, 513 S.W.2d 1, 3 (Tex.Supp. 1974); Trimble v. Texas State Board of Registration for Professional Engineers, 357 S.W.2d 876 (Tex.Supp. 1965).

Texas Employment Commission v. Johnnie Dodd Automotive Enterprises, Inc., 551 S.W.2d 171, 174 (Tex.Civ.App. -- Waco 1977, writ ref'd n.r.e.). See also

Lewis v. Metropolitan Savings and Loan Ass'n, 550 S.W.2d 11 (Tex. 1977).

Commissioner Mauro's failure to provide Petitioner Hollingsworth the opportunity for a hearing before the General Land Office not only violated the Administrative Procedure and Texas Register Act, it also violated TEX.CONST.ART. 1, §19 and the fifth and fourteenth Amendments to the U.S. Constitution.

ARGUMENT II

THE BELOW COURT WAS TAINTED BY THE EX PARTE COMMUNICATION TO THE COURT BY COMMISSIONER MAURO'S NOVEMBER 30, 1990 LETTER TO THE SUPREME COURT WHICH RENDERED THE COURT UNABLE TO AFFORD PETITIONER A FAIR AND IMPARTIAL HEARING

Commissioner Mauro, who was represented by the Attorney General of the State of Texas, took it upon himself to contact the Supreme Court of Texas directly, making accusations which are

not contained in the trial record. See Appendix H.

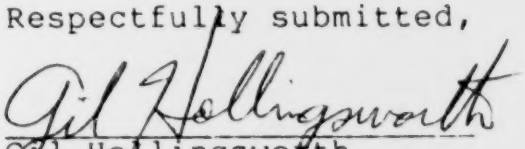
This action on his part is specifically prohibited by Canon 3A(5) of the Code of Judicial Conduct. Because of this contact with the Court, Petitioner was not afforded a fair and impartial hearing with the below Court as guaranteed by the Constitution of the United States. Petitioner was not afforded an opportunity to respond to the communication prior to the Court denying the application for Writ of Error on December 5, 1990.

Commissioner Mauro's ex parte communication poisoned the court and closed the door outside the rules of civil procedure and canons of judicial conduct.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,



Gil Hollingsworth
Pro Se

P. O. Box 10592
Midland, Texas 79702

APPENDIX A

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 5, 1990

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
111 West Sixth Street, Suite 300
Austin, Texas 78768-2011

Mr. Paul E. Kinsely
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
Austin, Texas 78768

Mr. Jose Manuel Rangel
Office of the Attorney General
Energy Division
P. O. Box 12548 Capitol Station
Austin, Texas 78711

RE: Case No. C-9715

Style: GIL HOLLINGSWORTH AND BRYCE E. EVANS v. GARRY MAURO, IN HIS CAPACITIES AS COMMISSIONER OF THE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by SIGNED

cc: Mr. Bryce E. Evans

APPENDIX B

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 9, 1991

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
111 West Sixth Street, Suite 300
Austin, Texas 78768-2011

Mr. Paul E. Kinsely
Spivey, Grigg, Kelly & Knisely
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Mr. Jose Manuel Rangel
Office of the Attorney General
Energy Division
P. O. Box 12548 Capitol Station
Austin, Texas 78711

Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

RE: Case No. C-9715

Style: GIL HOLLINGSWORTH AND BRYCE E. EVANS v. GARRY MAURO, IN HIS CAPACITIES AS COMMISSIONER OF THE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for

rehearing of the application for writ in error in the above styled case. Petitioner's motion to sever is overruled.

Sincerely,

JOHN T. ADAMS, Clerk

by SIGNED

cc: Mr. Bryce E. Evans

APPENDIX C

IN THE COURT OF APPEALS, THIRD DISTRICT
OF TEXAS, AT AUSTIN

NO. 3-89-066-CV

STATE OF TEXAS, ET AL.,

APPELLANTS

vs.

GIL HOLLINGSWORTH, ET AL.,

APPELLEES

FROM THE DISTRICT COURT OF TRAVIS
COUNTY, 201ST JUDICIAL DISTRICT

No. 344,540-A, HONORABLE HUME COFER,
JUDGE

Gil Hollingsworth and Bryce E. Evans appeal from a trial-court judgment cancelling certain claims to real property recorded by them with the county clerks of various Texas counties, the judgment having been rendered in a suit to quiet title brought by several State authorities.[1] We will affirm the judgment.

THE CONTROVERSY

The controversy requires that we determine the proper construction and scope of Subchapter G of the Texas Natural Resources Code. Tex. Nat. Res. Code Ann. §§ 52.221 - 52.252 (1978). The Sixty-Eighth Legislature, repealed the subchapter, effective February 1, 1983, 1983 Tex. Gen. Laws, ch. 1, at 1, but the controversy arose from events immediately before that date.

IN THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED DECEMBER 6, 1989

No. 3-89-066-CV

STATE OF TEXAS, ET AL. V. GIL HOLLINGSWORTH, ET AL. APPEAL FROM 201ST DISTRICT COURT OF TRAVIS COUNTY BEFORE

JUSTICES POWERS, CARROLL AND ABOUSSIE

AFFIRMED -- OPINION BY JUSTICE POWERS

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that Gil Hollingsworth and Bryce E. Evans, as principals, and Merchants Bonding Company-Mutual, as surety on the cost bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

Subchapter G, administered by the Commission of the General Land Office, pertained generally to the issuance of

permits to prospect for oil and gas on certain real property in the public domain. One such permit gave the holder an exclusive right to prospect for State-owned oil and gas on "surveyed lands," and to obtain a lease for the development of such minerals if he found production in paying quantities.

Section 52.222 of Subchapter G authorized persons to select surveyed lands upon which they wished to prospect for oil and gas, and to file with the county clerk of the county in which a tract was located a written application for a permit, designating the tract sufficiently to identify it. The county clerk was directed to "file and record" the application on payment of a $1.00 fee; and within 30 days thereafter, the application was required to be filed in the General Land Office.[2]

Section 52.225(a) directed the Commissioner to file the application on receipt of (1) a $1.00 filing fee, (2) an affidavit indicating the applicant's interest in any other lease, patent, or permit issued under Chapter 52 of the Natural Resources Code, and (3) a sum of money calculated on the basis on 10 cents per acre for each acre included in the application. Section 52.225 (b) provided as follows:

> If examination of the application and field notes are found to be correct and the area for which application is made is covered by the provisions of this subchapter, the commissioner shall issue to the applicant or his assignee a permit conferring on him an exclusive right to prospect for and develop oil and gas within the designated area for a period of not more than two years.

(Emphasis added). Section 52.226 required an annual payment of 10 cents per acre, in addition, until oil in

paying quantities was obtained and the payment of royalty commenced. (See § 52.229). The mention of a royalty referred to the fact that § 52.231 gave the permit holder the right to a lease if he found and produced oil or gas in paying quantities, the lease to run for the period of such production. After the first year from the effective date of any lease, § 52.236 provided for the payment of two dollars per acre and a royalty of one-eighth on the value of the gross production of oil, and in the case of a gas well a royalty of one-tenth on the value of the meter output of all gas disposed of off the premises. The sums received by the Commissioner from such payments were directed by § 52.241 to the permanent funds of the public schools and asylums, or to the available fund or permanent fund of The

University of Texas.

Subchapter G originated in a statute enacted in 1913. 1913 Tex. Gen. Laws, ch. 173, at 409. A 1917 enactment, in substantially the same form, was compiled as article 5338 of the 1925 Revised Civil Statutes. 1917 Tex. Gen. Laws, ch. 83, at 158.[3]

Before the repeal of Subchapter G, Hollingsworth and Evans undertook to obtain prospecting permits from the Commissioner, as authorized by the Subchapter. They filed and recorded with the county clerks of various counties applications covering approximately 95,500 acres of land, embracing 70,000 acres dedicated to the Permanent University Fund, 15,800 dedicated to the Permanent School Fund, and 9,700 acres belonging to the Texas Department of Corrections. When they attempted to

file their application with the Commissioner, he returned them on the ground that Subchapter G was "invalid."

Thereafter the Commissioner and other affected public bodies sued Hollingsworth and Evans in district court. They prayed for judgment cancelling the applications, recorded in the counties where the lands in question were situated, "and removing the cloud on [the State's] title" which resulted from the "filing of such applications." Alternatively, they prayed for a declaratory judgment as follows: (1) Subchapter G did not apply to the lands in question; or (2) Subchapter G was "without force and effect"; or (3) Subchapter G did not apply to the lands in question until other public authorities had made the lands available for leasing under Subchapter G; or (4) the

Commissioner was not obliged to consider the applications "for any purpose" after the repeal of Subchapter G.

Hollingsworth and Evans counter-claimed for judgment compelling issuance of the permits on the grounds that they were entitled to them as a matter of law or that the Commissioner was estopped to refuse their issuance.

On undisputed and stipulated facts, and following a bench trial, the court below rendered judgment cancelling the recorded applications in the various counties, "as a cloud on the title" of the State, based on determinations that the applications were "null and void" and "of no force and effect." The judgment recites that all relief not granted "is expressly denied."

Hollingsworth and Evans appeal on six points of error: (1) the trial

court lacked subject-matter jurisdiction in the absence of a final decision by the Commissioner, from which a suit for judicial review might be filed by a "person aggrieved" as contemplated in the Administrative Procedure and Texas Register Act, Tex.Rev.Civ.Stat.Ann.art. 6252-13a, § 19(a) (Supp. 1989); (2) the trial court erred in exercising jurisdiction because essential issues were committed to the primary jurisdiction of the Commissioner, to be decided in a contested case under art. 6252-13a, § § 13 - 20; (3) the Commissioner's action in denying Hollingsworth and Evans a contested-case proceeding deprived them of due process of law, and the trial court erred as a matter of law in failing to hold as much; (4) the trial court erred in holding the applications invalid because Subchapter G was a valid

statute applicable to the lands in question, and Hollingsworth and Evans had complied with its terms under the evidence adduced; (5) the trial court erred in holding the applications null and void, respecting the lands of the Department of Corrections, because Subchapter G was a valid statute that encompassed those lands; and (6) the trial court erred in failing to hold the Commissioner estopped from refusing to issue the permits on a claim that Subchapter G was "invalid."

DISCUSSION AND HOLDINGS

The validity of each of the six points of error brought by Hollingsworth and Evans, and the soundness of their argument thereunder, depends ultimately upon a single issue: Did Subchapter G, before its repeal, apply to the lands in question, it being undisputed that

70,000 acres and 15,800 acres were dedicated to the university and public school funds, respectively, and that 9,700 acres belonged to the Department of Corrections? We conclude from our own study of the matter that the lands in question did not come within the scope of Subchapter G and its provisions for obtaining an exclusive right to prospect for oil and gas, followed by a lease subject to the specified royalties in the event oil or gas was found and produced in paying quantities.

By its terms, Subchapter G did not exclude any lands dedicated to the university and public school funds, or any belonging to the Department of Corrections. Indeed, § 52.241 implied that university and public school lands would be included within the scope of the subchapter. We believe, however,

that such lands were not included within the scope of Subchapter G when the present controversy arose. We think, in fact, there can be no doubt about the matter because legislative enactments after 1913 (the date of the first enactment of provisions that formed the basic framework of Subchapter G) evidence an unmistakable purpose to establish a different scheme for developing the oil and gas under such lands, administered in whole or in part by public authorities other than the Commissioner. These subsequent enactments are now found in Tex. Educ.Code Ann §§ 66.61 - 66.82 (1972 & Supp. 1989) (university lands), Tex. Nat. Res. Code Ann. §§ 32.001 - 32.157 (1978 & Supp. 1989) (public school lands), and Tex. Nat. Res. Code Ann. §§ 34.001 - 34.066 (1978 & Supp. 1979) (lands belonging to the Department of

Corrections). These statutes became effective before the present controversy arose, and establish a system whereby public bodies other than the Commissioner are empowered to select the lands to be leased and to choose the timing for development of the oil and gas, as opposed to such matters being determined by private persons under Subchapter G. See generally Whitworth, Leasing and Operating State-Owned Lands for Oil and Gas Development, 16 Tex. Tech L. Rev. 673, 677-679, 684-685, 685 (1985).

The system allows more favorable terms for the State, in the matter of royalties and other sums, than did Subchapter G before its repeal. The post-1913 legislation was enacted with the explicit purpose of taking university and public school land of the sta-

tutory provisions that became codified as Subchapter G, based on legislative determinations that these statutory provisions had worked to the serious disadvantage of the State. In the case of lands belonging to the Department of Corrections, it appears that the Legislature never intended them to come within the terms of the statutes later codified as Subchapter G; in any case, however, they were explicitly removed therefrom by an enactment which became effective well before the present controversy.

The permit system of Subchapter G is absolutely inconsistent with the competitive-bid system established in the subsequent legislation mentioned above. After university lands, public school lands, and lands belonging to the Department of Corrections were expli-

citly made the subject of competitive bidding, no later enactment ever placed such lands back within the scope of the statutes that became Subchapter G.

For all the foregoing reasons, we conclude the Commissioner lacked the power and authority to issue the permits for which Hollingsworth and Evans applied.

We should, of course, refer briefly to the legislative enactments upon which our conclusions are based. Each was enacted well after 1913 when the statutory provisions codified as Subchapter G were first enacted, and well after 1917 when they were altered to the form in which they existed in Subchapter G, but before the events in controversy here.

University Lands

In 1925, the Legislature enacted a statute authorizing the Commissioner to

solicit and accept competitive bids on university lands, the winner being entitled to drill for oil and gas and to obtain an "absolute lease" on production of oil or gas in paying quantities. The sums paid the State under such statute were directed to the Permanent University Fund. the statute extended for a period of five years "[a]ll oil and gas permits" theretofore "issued upon lands included" within the terms of the statute. (Emphasis added). 1925 Tex. Gen. Laws, ch. 71, § 14, at 229.4 The 1925 enactment impliedly repealed the 1917 enactment in its application to university lands. Id. at 225-229; see Theisen v. Robinson, 8 S.W.2d 647 (Tex. 1928).

In 1929, the Legislature repealed the 1925 statute, and withdrew entirely, from lease or sale, "all oil and gas in

University lands until such time as the Legislature may enact laws deemed adequate for the protection of University fund[s]..." 1929 Tex.Gen.Laws, ch. 2, at 6. The Commissioner was expressly directed not to consider applications filed for the purchase or lease of such oil and gas, and to return all applications together with all remittances submitted to him. Id.

Soon afterwards, the same Legislature enacted a statute creating the Board for Lease of University Lands, and assigned it certain duties. Among these were the duty to place on the market whole surveys, or divisions of surveys, selected by the Board from "University lands," for the purpose of soliciting bids for the purchase of oil and gas, the successful bidder being entitled to a lease on the terms set out

in the statute. The bids were required to specify a delay rental, a royalty, and any other sums the bidder wished to offer. Minimums were provided in the statute for delay rentals (10 cents per acre) and royalty (one-eighth for oil and gas), the Board being empowered to set higher minimums. Payment of funds under the leases was directed to the Permanent University Fund (the royalties) and the Available University Fund (delay rentals and all other sums apart from royalties). The enactment covered all unsold university lands and all minerals reserved under university lands that had been sold. 1929 Tex.Gen.Laws, ch. 282, at 616-21. The Legislature enacted the statute to be effective immediately, reciting as follows in §19:

> Since there is no law authorizing the sale of oil and gas leases on

University lands this fact creates an emergency....

Id. at 621. The declaration that "no law authoriz[ed] the sale of oil and gas leases on University lands" refers, of course, to that Legislature's previous withdrawal, from all lease or sale, "all oil and gas in university lands ... until such time as the Legislature may enact laws deemed adequate for the protection of University funds ...." The 1929 enactment is now codified, in substance, as Tex.Educ. Code Ann. §§ 66.61 - 66.82 (1972 & Supp. 1989).

We conclude that the Legislature in 1925 removed from the scope of the 1917 enactment (which became Subchapter G) the oil and gas under university lands. So much is implied in the provision for a competitive-bid system in the 1925 enactment, and its express provision for extending, for five years, the oil and

gas permits previously issued on university lands. In any event, the matter was placed beyond doubt by the 1929 enactment which explicitly withdrew from sale or lease "all oil and gas in University lands," until the effective date of the 1929 statute which created the Board of Lease of University Lands with a duty to administer a competitive-bid system. The emergency clause in that enactment made it clear that the Legislature understood that such lands were not included within the terms of any other existing statute, such as the 1917 enactment that had, by that time, been compiled as Tex. Rev. Civ. Stat. Ann. art. 5338 (1925) (and later codified as Subchapter G of the Natural Resources Code).

PUBLIC SCHOOL LANDS

In 1931, the Legislature enacted a

statute to regulate the sale and lease of lands set apart for the benefit of the public free school fund. 1931 Tex. Gen. Laws, ch. 271, §§ 8-11, at 454-55. Sections 8 through 11 pertained to the leasing of such lands for the production of oil and gas. They established a competitive-bid system administered by the Commissioner and set minimum prices per acre (one dollar) and royalty (one-eighth), the proceeds being directed to the available and permanent school funds. Section 13 of the Act provided: "Articles 5323, 5338, and 5374, Revised Civil Statutes, 1925, and all other laws or parts of laws in conflict herewith are hereby repealed." (Emphasis added). Article 5338 of the 1925 Revised Civil Statutes was, of course, the 1917 enactment which authorized prospecting permits on sur-

veyed lands. We need not digress on the effect of this apparently unqualified repeal of the provisions which became Subchapter G, for it was followed in 1939 by another statute as discussed below. It is sufficient for present purposes that the Legislature in 1931 obviously did not intend public school lands to be included within the fixed-price and fixed-royalty system eventually codified as Subchapter G.

In 1939, the Legislature withdrew from sale or lease all public free school lands "authorized by any law of this State to be sold or leased" until the expiration of 90 days from the date of the Legislature's adjournment. The withdrawal did not apply, however, "to applications to purchase or lease filed with the Commissioner ... prior to the effective date of [the] Act or to

applications" then involved in litigation. In addition, the enactment suspended all laws and parts of laws, in conflict with the enactment, for the same period of 90 days after adjournment. In an emergency clause, the Legislature declared "that existing laws do not provide adequate protection for the Permanent School Fund in the selling and leasing of lands set apart" for the fund. 1939 Tex. Gen. Laws, ch.1, §§ 1-4, at 463-64. The same Legislature subsequently enacted legislation establishing the School Land Board and directing it to administer a different system in order to supply adequate protection for the fund. It became effective 90 days after adjournment. The Board was given power to lease surveyed and unsurveyed lands set apart for the permanent free school fund, based on a

competitive-bid system, the Board being authorized to fix the dates for the sale and lease of surveyed lands and the prices for which surveyed and unsurveyed lands would be leased. The Board was given authority to reject any and all bids. 1939 Tex. Gen. Laws, ch. 3, §§ 2-8, at 473-78. These provisions became Tex. Rev. Civ. Stat. Ann. art. 5421c (1962) before their present codification as Tex. Nat. Res. Code Ann. §§ 32.001 - 32.157 (1978 & Supp. 1989).

Nothing we have found indicates that the Legislature ever intended, in any subsequent enactment, to place public free school lands once again within the provisions now found in Subchapter G. We therefore conclude that the Subchapter does not apply to such lands.

LANDS OF THE DEPARTMENT OF CORRECTIONS

In 1930, the Legislature enacted a

statute providing for the leasing of lands owned and held by the State as "prison lands." The enactment created the Board for Lease of Texas Prison Lands (now the Board for Lease of the Department of Corrections), and established a competitive bidding procedure administered by the Board with respect to the making of oil and gas leases on such lands. The statute specified the royalties and other sums payable in connection with such leases. The emergency clause declared the Legislature's view that there existed "no law authorizing the sale of oil and gas leases on Prison lands ...." 1930 Tex. Gen. Laws, ch. 13, at 16 (4th C.S., 41st Leg.). The enactment now exists as Tex. Nat. Res. Code Ann. §§ 34.001 - 34.066 (1978 &n Supp. 1979). We conclude therefore, that the Legislature

intended that the leases of such lands for oil and gas development be governed by the new statute and not the existing statutes which eventually became Subchapter G.

In summary, the lands in question might fall within Subchapter G owing to the all-encompassing scope of the terms "surveyed lands" and "unsurveyed lands" to which the Subchapter literally applies. It is equally plain, however, that the lands fall explicitly within the statutory provisions for competitive bids administered by the other public bodies mentioned above. The deciding issue is where the Legislature intended to place the lands. We think every applicable rule of statutory interpretation and construction points unequivocally to an intention to place the lands under Tex. Educ. Code Ann. §§ 66.61 -

66.82 (1972 & Supp. 1989) (university lands), Tex. Nat. Res. Code Ann. §§ 32.001 - 32.157 (1978 & Supp. 1989) (public school lands), and Tex. Nat. Res. Code Ann. §§ 34.001 - 34.066 (1978 & Supp. 1989) (lands belonging to the Department of Corrections) in lieu of Subchapter G. It is sufficient to mention only that the more specific statutes are a better guide to Legislative intention than the general provisions of Subchapter G. Sam Bassett Lumber Co. v. City of Houston, 198 S.W.2d 879, 881 (Tex. 1947); Code Construction Act, Tex. Gov't. Code Ann. § 311.026 (1988); see also Allen v. Mauro, 733 S.W.2d 228 (Tex. App. 1986, writ ref. n.r.e.). We hold, therefore, that the Commissioner had no authority to issue the permits under Subchapter G.

Hollingsworth and Evans attack the

trial court's jurisdiction to award the judgment rendered solely on the theory that the Commissioner had the authority that they claim he had. On the same theory, they claim estoppel, a denial of due process, and a legal right to the permits in question. We overrule their points of error and affirm the trial-court judgment.

John Powers, Justice

[Before Justices Powers, Carroll and Aboussie]

Affirmed

Filed: December 6, 1989

[Published]

FOOTNOTES

1 The appellees are Garry Mauro, Commissioner of the General Land Office, the State of Texas, the School Land Board, the Board for Lease of University Lands, and the Board for Lease of the Department of Corrections.

2 Section 52.224 of Subchapter G provided a similar procedure in the case of unsurveyed lands, the applicant being required to file his original application with the county surveyor, for whom he received field notes of the tract indicated in his application. The papers were required then to be filed with the General Land Office, evidently by the surveyor. We shall discuss only § 52.222, which governed surveyed lands, but our reasoning and holdings apply equally to § 52.224.

3 The mineral-permit procedure of subchapter G originated in a 1913 enactment of the Legislature. Section 1 of the act included within its terms [a]ll public school, University, asylum and the other public lands, fresh water lakes, islands, bays, marshes, reefs, and salt water lakes ...." Persons wishing to prospect on "any of the surveyed lands" were required to file with the county clerk an application designating the land he wished to prospect, and another application in the General Land Office within 30 days of his filing with the county clerk. Persons wishing to prospect on any of the specified submerged lands, or any "unsurveyed public land," were required to file a written application with the county surveyor, who was obliged to survey the tract and furnish the applicant the field notes and the original application. The papers were required then to be filed in the General Land Office.

> On payment of the required sums and the satisfaction of other conditions imposed in the Act, the Commissioner was required to issue a permit. 1913 Tex. Gen. Laws, ch. 173, at 409.
>
> In 1917, the foregoing statute was amended. Section 1 of the Act substituted 39 named substances in lieu of the general term "minerals" used in the 1913 enactment. The provisions relative to obtaining a permit to prospect for petroleum and natural gas remained basically the same, and new procedures were supplied for obtaining permits to prospect for "coal and lignite" and "other minerals." The public lands within the Act remained the same. 1917 Tex. Gen. Laws, ch. 83, at 158. The provisions relating to all minerals except oil, natural gas, coal, and lignite were later amended in 1919. 1919 Tex. Gen. Laws, ch. 79, at 241 (2d C.S., 36th Leg.). We need not refer to those amending provisions.

As a result of the foregoing enactments, the 1925 compilation of statutes provided in part as follows:

> Art. 5338. Permit. -- Subject to the terms hereof, permits for the development of oil and gas may be issued to any person, firm or corporation upon the following lands: All surveyed public school, University, asylum land and other public lands, fresh water lakes, river beds and channels, belonging to the State and

all of said lands, except public school and asylum lands sold or disposed of by the State or by its authority with a reservation of minerals or mineral rights therein, and lands purchased with a relinquishment of the minerals therein. [Acts 1917, p. 158; Acts. 2d C.S. 1919, p. 241.]

Art. 5339. Application for surveyed lands. -- One desiring to obtain the right to prospect for and develop oil and natural gas that may be in any surveyed area included herein shall file with the county clerk a written application designating it sufficiently to identify it. ..... [Acts. 1917, p. 158.]

Art. 5340. Unsurveyed lands: application. -- One desiring to obtain the right to prospect for and develop oil and natural gas in any unsurveyed areas named in this law shall file with the county surveyor a written application .... [Id.]

Art. 5341. Issuance of permit. -- When the Commissioner receives an application that was filed with the county clerk or with the surveyor and the field notes and plat, ... [and related papers], he shall file the same, and if upon examination the application and field notes are found correct and the area applied for is within the provisions of this law, the Commissioner shall issue to the applicant or his assignee a permit conferring upon him an exclusive right to prospect for and develop

> petroleum and natural gas within the designated area for a term not to exceed two years. [Id.]

The 1925 compilation also included the terms of 1925 Tex. Gen. Laws, ch. 71, at 225, pertaining to university lands. The enactment, compiled as art. 5343, provided as follows:

> Art. 5343. University permits. -- The provisions of subdivision 3 of this Chapter [asylum and school lands that had been sold], so far as they relate to a combination of permits and extension of time for beginning development and time for development thereunder, shall apply to permits upon University land.

The compilation here includes the note: "[f]ollowing is additional legislation. Acts 1925, Chapter 71, p. 225. Article 5343 then continued:

> Section 1. That all university land now unsold and all of said land that has heretofore been sold with reservation of the minerals therein and that which may hereafter be sold with reservation of the minerals therein, whether known or unknown, shall be included in this Act and leases thereon conferring upon persons, firms and corporations the right to develop the oil and natural gas that may be in said land shall be subject to sale by the Commissioner of the General Land Office in accordance with the provisions of this Act and under such rules and regulations as may be

> adopted by said commissioner as may be necessary to the proper execution of its purposes; provided, oil and gas permits and leases outstanding, shall not be affected by this Act except as provided in Section 14 hereof.

(Emphasis added). Succeeding provisions tracked the 1925 enactment by providing for a sale price of ten cents per acre for the first year, twenty-five cents per acre for the second year, and fifty cents per acre for each year thereafter until producton in paying quantities is secured, not to exceed five years, coupled with a royalty of one-eighth of the oil produced and saved and one-eighth of the natural gas produced and sold off the lease, "and in addition thereto such sum of [sic] any, that one may pay therefor as provided herein." Section 4 provided for the safe-keeping applications to purchase and attendant bids; and "[w]hen an application shall have been filed and considered and the land found subject to lease, the lease shall be issued for a term not to exceed five years to the applicant that pays the most, in any sum, for the area in addition to the ten cents per acre and the stipulated royalty." (Emphasis added). All bids were rejected in the case of tie bids for the same property. We discuss in the text the effect of this 1925 amendment. Competitive bidding remained the basis for awarding leases on university lands until the present time, as indicated in the text.

The provisions of the 1925 compilation were carried forward to those of 1936

and 1948, thense into the National Resources Code.

4 See fn. 3

APPENDIX D

NO. 344,540-A

GARRY MAURO, COMMISSIONER
OF THE GENERAL LAND OFFICE
V.
BRYCE E. EVANS AND
GIL HOLLINGSWORTH

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201ST JUDICIAL DISTRICT

FINAL JUDGMENT

On the 15th day of December, 1987, came to be heard the above-entitled and numbered cause wherein the State of Texas, the School Land Board, the Board for Lease of University Lands, the Board for Lease of the Department of Corrections, along with Garry Mauro, in his capacity as Commissioner of the General Land Office of Texas, Chairman of the School Land Board, Chairman of the Board for Lease of University Lands,

and Chairman of the Board for Lease of the Department of Corrections, are Plaintiffs, and Bryce E. Evans and Gil Hollingsworth are Defendants.

Plaintiffs and Defendants, through their attorneys of record, announced ready for trial before the Court without the intervention of a jury, and the testimony, evidence, briefs and the arguments of counsel having been heard and duly considered, it was and is the opinion of the Court, and the Court finds that the law and the facts are with the Plaintiffs and against the Defendants.

It is ORDERED, ADJUDGED and DECREED that all applications to obtain oil and gas prospect permits filed by Defendants, Bryce E. Evans and Gil Hollingsworth, pursuant to Sections 52.221 through 52.252 of the Texas Natural Resources Code (Vernon 1978) in

any county within the State of Texas where any of said Defendants may have filed such applications, including but not limited to Brazoria, Calhoun, Culberson, Reeves, Andrews, Crane, Crockett, Ector, Pecos and Upton Counties, are null and void, and are hereby cancelled and discharged of record and determined to be of no force and effect, and such applications are hereby removed as a cloud on the title of any of Plaintiffs' oil, gas and/or other minerals located in any of those counties.

It is further ORDERED, ADJUDGED and DECREED that all declaratory judgment relief sought by Plaintiffs and Defendants through their respective actions for declaratory judgment, as well as all other relief not expressly granted hereinabove is expressly denied.

Costs of suit are hereby taxed jointly and severally against Defendants Bryce E. Evans and Gil Hollingsworth.

SIGNED on the 13th day of December, 1988.

SIGNED
HUME COFER

Presiding Judge

APPENDIX E

NO. 344,540-A

GARRY MAURO, COMMISSIONER
OF THE GENERAL LAND OFFICE
V.
BRYCE E. EVANS AND
GIL HOLLINGSWORTH

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201ST JUDICIAL DISTRICT

CONCLUSIONS OF LAW

There were no District Court fact findings in this case, because all of the material facts were stipulated or undisputed. The Judgment is based on a conclusion that the applicable rules of law are correctly stated by Allen V. Mauro, 733 S.W.2d 228 (El Paso, 1986, writ ref. n.r.e.), as stated by the following District Court conclusions of law in the present case.

1. Sections 55.221 through 55.252,

Natural Resources Code, can and should be reconciled with Sections 66.61 through 66.80, Texas Education Code, concerning leasing Permanent University Fund lands; and with Sections 23.001 through 32.111 and Sections 52.001 through 52.153, Natural Resources Code, concerning leasing Permanent School Fund lands; and with Sections 34.001 through 34.185, Natural Resources Code, concerning leasing Texas Department of Corrections land.

2. The specific statutes concerning leases of the University, School, and Department of Corrections land involved in this case control over the general statutes relied on by the defendant applicants, and defendants are not entitled to leases under those general statutes.

3. By filing applications under

general statutes that do not apply to the lands involved in this case, defendants have created a cloud on the title to said public lands, and plaintiffs are entitled to a judgment removing that cloud.

4. A 1983 letter from the General Land Office asserting a different law contention did not estop plaintiffs from relying on the rules of law on which the above conclusions are based.

5. The District Court has jurisdiction to determine plaintiffs' action to clear the title to the lands in question.

6. The Court should not consider or decide the status of defendants' applications in the General Land Office, because that issue is moot if the Commissioner's 1983 action was a final order, and because, if the applications

are still pending in the General Land Office, a decision on that issue would be advisory, and the courts do not have jurisdiction to consider advisory decisions.

Signed this 19th day of May, 1989.

SIGNED
Judge Presiding

APPENDIX F

NO. 344,540-A

GARRY MAURO, COMMISSIONER

OF THE GENERAL LAND OFFICE

V.

BRYCE E. EVANS AND

GIL HOLLINGSWORTH

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201ST JUDICIAL DISTRICT

DEFENDANT, GIL HOLLINGSWORTH'S FIRST AMENDED ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Gil Hollingsworth, who has been named as a Defendant in the above-styled cause, and in answer to the Plaintiff's Original Petition filed therein would respectfully show the Court as follows:

I.

Subject to such stipulations and admissions as have or may hereafter be

made, this Defendant asserts a general denial as is authorized by Rule 92 of the Texas Rules of Civil Procedure, and Defendant respectfully requests that Plaintiff be required to prove the charges and allegations against this Defendant by a preponderance of the evidence as is required by the Constitution and laws of the State of Texas.

II.

In the alternative, without limiting or waiving the above general denial, Defendant states that he properly and timely filed applications for permits to prospect for oil and gas on land of the Permanent School Fund and Permanent University Fund prior to repeal of Subchapter G., Permits and Leases, of Chapter 52, Section 52.221 et seq., of the Texas Natural Resources Code. Defendant took all necessary steps to

perfect his applications to prospect for oil and gas as required by the Code and filed his applications with Plaintiff herein. Without notice, hearing or decision in compliance with the Administrative Procedure and Texas Register Act, Plaintiff filed this cause of action.

III.

The acts and conduct of Plaintiff herein, his agents and employees, constitutes a clear violation of the Administrative Procedure and Texas Register Act and the due process clause of the Constitution of the State of Texas and United States.

IV.

As a result of the acts and conduct of Plaintiff, his agents and employees, this lawsuit has been on file for approximately five (5) years without the

above referenced permits being issued or a decision being made on them. Accordingly, Plaintiff should be estopped and prevented from asserting any authority over this matter and this Court should order the permits be issued to said Defendant.

WHEREFORE, the above Answer is respectfully submitted to the Court by Defendant who asks he be issued the oil and gas prospecting permits and such other and further relief, both general and special, at law and in equity, to which he is entitled to or the Court may deem proper.

Respectfully submitted,

TOM SAWYER
2209 Hopi Trail
Austin, TX 78703
512/477-7559

ATTORNEY FOR GIL HOLLINGSWORTH

By SIGNED
Tom Sawyer
State Bar No. 17694500

APPENDIX G

GARRY MAURO
Commissioner
General Land Office

February 3, 1983

Gill Hollingworth
4710-B Dentcrest
Midland, Texas 79703

Dear Mr. Hollingworth:

I have been informed that you have attempted to file Applications for Prospect and Development of Surveyed Land in Crane, Pecos, and Andrews County.

Your application will not be accepted for filing in the General Land Office because Subchapter G of the Natural Resources Code is invalid and of no force and effect.

In addition, I cannot condone your attempt to deprive the Permanent School Fund of desperately needed revenue used to support our system of public schools. I must uphold my oath of office by

rejecting your attempted filing and I will fight any attempt by you to resubmit an application and will institute the necessary legal action to prevent any trespass on state-owned land.

Sincerely,

SIGNED

Garry Mauro
Commissioner

GM/mhr

Enclosures

Stephen F. Austin Building
1700 North Congress Avenue
Austin, Texas 78701
(512) 475-2071

APPENDIX H

November 30, 1990

Mr. John T. Adams
Clerk, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711-1224

Re: No. C-9715
Gil Hollingsworth and Bryce Evans v. Garry Mauro

Dear Mr. Adams:

The briefing on the application for writ of error has been completed on this case for seven months. However, I feel compelled to advise the Court on recent developments and the very real possibility of injury to a growing number of innocent investors. I would appreciate your bringing this letter to the attention of the Court.

This case grows out of a controversy which confronted me during my first month as Land Commissioner in 1983. Several individuals attempted to file prospect permits on hundreds of

thousands of acres of state land. Evans and Hollingsworth together attempted to file permits on 95,500 acres of state land, clouding title to 15,800 of Permanent School Fund land and 9,700 acres of Texas Department of Corrections lands. I refused to file those permits, believing the statute under which they were submitted to be invalid and to not authorize the giving away, below market value, of the state's minerals.

We have spent almost eight years clearing our title to this acreage. We prevailed in the El Paso Court of Appeals in 1986, and this Court refused the writ in Aller v. Mauro, 733 S.W.2d 288 (Tex. App. - El Paso 1986, writ ref'd n.r.e.), a related case involving almost identical facts to the one now before this Court. This cleared title to approximately 200,000 acres of state

land, freeing it to be leased under sealed bid procedures, leaving clouded the 95,500 acres itemized above.

We prevailed in the Austin Court of Appeals eleven months ago in this case. It has come to our attention that Mr. Evans has been selling interests in these purported permits for substantial sums to investors in Texas and as far away as Florida. My office has been contacted, almost always after the investment has been made, and the investors are shocked to learn that they have invested hundreds of thousands of dollars in permits which the Land Office and the courts of this state refuse to recognize as having any validity.

Mr. Evans is not, as best we can tell, fully disclosing the status of these permits and this litigation to many of

his investors. In fact, Mr. Evans' activities are being investigated by both the Texas Securities Board and the Travis County District Attorney.

Until the writ is acted on by the Court and this issue is put to rest, Mr. Evans will be given additional time to sell additional interests in these permits to innocent and uninformed investors. I cannot, in good conscience, stand by and wait without bringing these special circumstances and concerns to the Court's attention.

Sincerely,

SIGNED

Garry Mauro,
Texas Land Commissioner

GM:jps

cc: All Counsel of Record

APPENDIX I

January 18, 1991

Mr. John T. Adams
Clerk, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711-1224

Re: No. C-9715
Gil Hollingsworth and Bryce Evans v. Garry Mauro

Dear Mr. Adams:

Although a final disposition has been made of this case, in light of the strong accusations of impropriety leveled against me by Petitioner Hollingsworth's counsel in their Motion to Sever and Motion for Rehearing, I feel compelled to respond. Please bring this letter to the attention of the Court.

First, let me apologize to this Court if I have offended any rule of procedure or diciplinary rule of professional conduct. My letter of November 30 was not intended as an attempt to improperly

influence or prejudice this Court on the merits of this case but rather to urge prompt action on a matter that had been pending for some time.

I believe I was obligated to bring these matters to the Court's attention by Texas Disciplinary Rule of Professional Conduct 3.03(a)(2) which directs a lawyer "to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act."

Additionally, I believe my communication to have been properly made under Texas Disciplinary Rule of Professional Conduct 3.05(b)(2) because I not only promptly sent Petitioner's counsel a copy of the writing but informed them the letter was going to be sent before it was delivered.

Although I believe it was clear in my

November 30 letter, I wish to reiterate that I have no evidence that in any way implicates Mr. Hollingsworth in any unlawful or questionable activity.

Although I have been ably represented by the Attorney General's Office in this matter, I find it hard to believe that prevents me as a constitutional officer of this state from communicating matters of public importance to members of the judiciary. I feel obligated to speak when the public interest demands it and will continue to do so unless instructed by this Court that my manner of so doing is improper.

Sincerely,

SIGNED

Garry Mauro,
Texas Land Commissioner

GM:SCK/ss

Enclosure

cc: All Counsel of Record

(2)

Supreme Court, U.S.
FILED
MAY 3 1991
OFFICE OF THE CLERK

NO. 90-1534

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GIL HOLLINGSWORTH,

Petitioner,

V.

TEXAS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Executive Assistant
Attorney General

ED SALAZAR
Assistant Attorney General
Chief, Energy Division

JOSE MANUEL RANGEL*
Assistant Attorney General
Texas State Bar No. 16543550

Energy Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2003

Counsel of Record for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court should become involved in a case involving purely state law disputes, where (a) the petitioner fails to raise a substantial "federal" claim; and (b) there is an independent and adequate state law basis for decision?

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NO. 90-1534

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GIL HOLLINGSWORTH,

Petitioner,

V.

TEXAS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the State of Texas, Garry Mauro, in his capacities as Commissioner of the General Land Office and Chairman of the Board for Lease of University Lands, and the Board for Lease of University Lands, submit this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Court of Appeals for the Third Supreme Judicial District of Texas, at Austin, in its opinion in its Cause No. 3-89-066-CV, accurately summarizes the procedural history of this case. However, because Petitioner Hollingsworth makes numerous misstatements of fact or law in the "Statement of the Case" contained in his Petition for Writ of Certiorari which potentially bear on the issues before the

Court, Respondents feel compelled to supplement the Texas court of appeals' opinion in response to some of those misstatements.

Petitioner Hollingsworth incorrectly describes the case before this Court in that he fails to recognize it for what it is - a suit to quiet title or, alternatively, for declaratory judgment relief. Although initially brought as a declaratory judgment suit, Respondents later amended their pleadings[1] to assert primarily a suit to quiet title. Through said action, Respondents requested the Texas trial court to remove the cloud placed on Respondents' title to the oil and gas underlying the lands at issue by Petitioner Hollingsworth's "Applications for Prospecting Permits" [2] on file in the Deed Records of the various County Clerk's Offices where such lands are located.

While Petitioner Hollingsworth correctly describes District Court Judge Hume Cofer's initial concerns regarding the trial court's jurisdiction to hear the parties' dispute, it is quite obvious that those same concerns were satisfied after the trial of the case and all the parties (including Respondents and Petitioner) had been provided every opportunity to fully develop their respective claims and legal theories, including the right after trial to amend their pleadings so as to conform with the issues tried before the court at the trial. It was then that Judge Cofer correctly realized that statutory compliance with Texas statutory law required Land Commissioner Mauro to do exactly what he had done with regard to Petitioner Hollingsworth's Applications, that is, refuse to file them.

Petitioner Hollingsworth correctly states at pages 15 and 16 of his Petition for Writ of Certiorari that he raised

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[1] See Appendix A, pages 1-3 ("Plaintiffs' Second Amended Original Petition").

[2] Sometimes hereinafter referred to as "Petitioner Hollingsworth's Applications" or simply the "Applications".

before the trial court a due process claim based on the Land Commissioner's "alleged refusal" to grant him an administrative hearing under the Administrative Procedure and Texas Register Act, Tex.Rev.Civ.Stat. Ann. art. 6252-13a (Vernon 1991) (hereinafter "APTRA")[3], and an alternative claim that Land Commissioner Mauro has not made a proper "final decision" under the APTRA, and that the district court therefore lacked jurisdiction over the alleged declaratory judgment action[4]. However, what Petitioner Hollingsworth conveniently fails to mention to the Court is that in his last written pleading entitled "Written Arguments of Defendant Gil Hollingsworth" (Appendix C, pages 1-3) filed with the trial court after the trial but prior to judgment, he decided to waive the above mentioned claims against Respondents and totally submit to the jurisdiction of the court by expressly requesting the court to declare Sections 52.221 through 52.252 of the Texas Natural Resources Code (Vernon 1978)[5] to be applicable to Permanent University Fund lands and to compel the Land Commissioner to issue the requested oil and gas prospecting permits.

Finally, even if Petitioner Hollingsworth did not fully submit to the jurisdiction of the trial court, it is clear, as Respondents intend to establish herein, that the APTRA is not applicable in a suit to remove cloud on title and thus, Petitioner's argument of denial of due process has no validity.

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[3] See Appendix F to Petitioner Hollingsworth's Petition for Writ of Certiorari ("Defendant, Gil Hollingsworth's First Amended Answer" filed with the trial court on April 20, 1988, four months after the trial).

[4] See Appendix B, pages 1-3 ("Supplemental Answer of Defendants Bryce E. Evans and Gil Hollingsworth" filed with the trial court on April 25, 1988).

[5] Sometimes hereinafter referred to as "the prospecting permit statutes".

REASONS FOR DENYING THE WRIT

A. This Case Presents No Federal Questions.

Respondents brought in the trial court what is commonly referred to as a "suit to quiet title." Respondents urged in each of the courts below that the action of Petitioner Hollingsworth in filing the Applications on Respondents' lands in the various Texas counties where such lands are located created a cloud on Respondents' title to the oil and gas under those lands and deprived (and indeed continues to deprive, pending the finality of the Texas Supreme Court's decision herein) Respondents the right to lease their oil and gas under such lands in accordance with existing and valid Texas statutes. Tex.Educ. Code Ann. §§ 66.61-66.80 (Vernon 1972 and Vernon Supp. 1991); *Allen v. Mauro,* 733 S.W.2d 228 (Tex.App. - El Paso 1986, writ ref'd n.r.e.).

The evidence in the trial court (the testimony of five witnesses and over 200 exhibits) showed that Petitioner has filed Applications for Prospecting Permits in the Deed Records of the various County Clerk's Offices in Texas covering approximately 70,000 acres of State of Texas lands, more specifically Permanent University Fund lands, and that such filings as a matter of law constitute a "cloud" upon the state's title to such lands.

A cloud upon title has been defined as: a semblance of title, either legal or equitable, or a claim of a right in real property appearing in some legal form, which, in fact, is invalid or which it would be inequitable to enforce. *Daugherty v. Garrett*, 336 S.W.2d 642 (Tex.Civ.App. - San Antonio 1960, writ dism'd w.o.j.); *Best Investment Co. v. Parkhill*, 429 S.W.2d 531, 534 (Tex.Civ.App. - Corpus Christi 1968, writ dism'd). More concisely stated, a cloud on title is a title or encumbrance apparently valid, but in fact invalid. *Heath v. First Nat. Bank of Cleburne*, 32 S.W. 778 (Tex.Civ.App. 1895, no writ); *Dalton v. Allen*, 56 S.W.2d

205 (Tex.Civ.App. - Amarillo 1932, writ dism'd); *Temple Trust Co. v. Logan,* 82 S.W.2d 1017 (Tex.Civ.App. - Amarillo 1935, no writ). As Judge Cofer correctly ruled in the trial court below, Petitioner Hollingsworth's Applications on file with the various Texas counties clearly fall within the above definitions of "clouds on title". Petitioner Hollingsworth's Applications have made Respondents' oil and gas minerals under the subject acres unmarketable and until all appeals have been exhausted and Judge Cofer's judgment declaring such applications of no force and effect becomes final, the title to such minerals will remain incumbered or clouded.

It was Petitioner's position in the Texas courts that his Applications on file with the various Texas counties gave him the right to obtain oil and gas leases on Permanent University Fund lands by virtue of the leasing statutes in Tex.Nat.Res. Code Ann. §§ 52.221 - 52.252 (Vernon 1978). This very question was before the Texas courts in *Allen v. Mauro,* 733 S.W.2d 228 (Tex.App. - El Paso 1986, writ ref'd n.r.e.), wherein the Texas court of appeals stated at p. 233:

> *The permit provisions only apply to public land which is not university or school fund land.* . . . This is evidenced by the specific nature of the statutes applying to the lease/sale of school/university fund land. Tex.Nat.Res. Code Ann. sec. 32.061 (Vernon 1978); Tex.Educ. Code Ann. sec. 66.64 (Vernon 1972). (Emphasis added)

And at p. 234:

> The 1979 act did not attempt to prescribe rules in the same area of law as the permit leasing statutes. What we view here are different parts of a system of legislation upon the same general subject. *The university fund land statutes provide for the bid process and*

> *vest control of such land in the board created for that purpose.* The permit leasing statutes are general in that they apply to all surveyed and unsurveyed state land. *The statutes relating to the lease of permanent university fund land are specific.* (Emphasis added)

The *Allen* case is clear authority that Petitioner Hollingsworth acquired no interest in the Permanent University Fund lands at issue in this case, and that his Applications for Prospecting Permits have no force and effect,[6] and that a judgment entered to that effect to remove the cloud on Respondents' title to the oil and gas under such lands was proper.

Petitioner has raised the issue that the Texas courts lack jurisdiction to hear Respondents' quiet title action because the General Land Office of the State of Texas has never evaluated the Applications on their merits as required by §§ 52.221 through 52.252 of the Texas Natural Resources Code (Vernon 1978) (the "prospecting permit statutes") and Tex.Rev.Civ.Stat. Ann. art. 6252-13a (Vernon Supp. 1991) ("APTRA"), thereby depriving him of "due process of law." There is simply no merit to this argument. All parties agree that Petitioner's Applications cover Permanent University Fund lands and as recognized by the Texas courts of appeals in both *Allen* and in this case,[7] there exist separate specific oil and gas leasing statutes covering the

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[6] Petitioner Hollingsworth, through counsel, recognized the controlling effect of *Allen* with respect to Permanent School Fund and Permanent University Fund lands, early on, as evidenced by 1) his First Motion for Continuance filed with the trial court (a copy of which is attached hereto as Appendix D), wherein he admitted that *Allen*, and this lawsuit involved identical issues, and 2) the statements of his counsel, Ronald O. Holman, at the trial of said cause, wherein he admitted the controlling effect of *Allen*. See Appendix E.

[7] See Appendix C to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 5-39.

leasing of such lands. There was simply nothing to evaluate with regard to Petitioner Hollingsworth's Applications once it was determined that all the lands covered thereby were university lands. The applicable specific leasing statutes covering the Permanent University Fund lands are found at Tex.Educ. Code Ann. §§ 66.61-66.80 (Vernon 1972 and Vernon Supp. 1991). The Board for Lease of University Lands has controlled the leasing of the types of land (Permanent University Fund lands) at issue in this cause for over 50 years. This was expressly recognized by the Texas Court of Appeals in *Allen*, at p. 235 of its opinion:

> The statutes relating to the board for lease of university lands and the statutes relating to the lease of school land and the School Land Board are *mandatory, as they use exclusive language which vests control of public school land and university land in their respective boards of control.* (Emphasis added).

Because there are applicable leasing statutes and specific procedures to be followed in leasing the lands in question, the Land Commissioner's action in refusing to accept Petitioner's Applications was quite proper. As recognized in *Allen,* at p. 233:

> A commissioner of the General Land Office has no authority except that conferred on him by law. *State v. Robison,* 119 Tex. 302, 30 S.W.2d 292 (1930).

Stated simply, the Land Commissioner had no authority or jurisdiction to issue prospecting permits on any of the lands in question since there were separate specific statutes governing the proper methods for leasing such lands.

Finally, Respondents find it necessary to inform the Court that even if it were to be assumed that *Allen* had never been decided, and assuming further that Petitioner

Hollingsworth were correct in his argument that the Land Commissioner was not only required to "file" the Applications but also to hold a formal administrative hearing under the APTRA,[8] Petitioner Hollingsworth's remedy under Texas law would have been to directly petition the Texas Supreme Court to issue a writ of mandamus against the Land Commissioner of the General Land Office ordering him to do so, instead of seeking a declaratory judgment from the Travis County District Court. *Theisen v. Robison*, 117 Tex. 489, 8 S.W.2d 646 (1978); *Duval Corp. v. Sadler*, 407 S.W.2d 493 (Tex. 1966); *Superior Oil Company v. State*, 458 S.W.2d 55 (Tex. 1970). Thus, even under the above assumed facts, this Court would lack jurisdiction to hear this appeal.

B. Petitioner Hollingsworth Was Provided Full Due Process By The Trial Court And Texas Court Of Appeals.

If due process is what Petitioner Hollingsworth wanted from the State of Texas, due process is exactly what he received. The trial on the merits in the trial court below was extensive and exhaustive. Respondents and Petitioner tendered the testimony of numerous witnesses and offered 52 exhibits and 155 exhibits, respectively, all of which were admitted into evidence at the trial. Counsel for the parties were also provided the opportunity to present before the trial court both opening and closing arguments, as well as extensive post-trial briefing in support of their respective claims. As evidenced by the parties' extensive pleadings filed with the trial court before and after trial, Judge Cofer's deliberations and rulings, and the extensiveness of the court of appeals' opinion, it cannot seriously be questioned that every factual and legal issue presented by the parties was thoroughly explored and canvassed, and the record, as compiled, was complete.

[8] Petitioner Hollingsworth never formally requested an administrative hearing before the Land Commissioner and thus, no "contested case" under the APTRA was ever triggered.

Petitioner Hollingsworth, through his various able attorneys of record, was afforded, by the Texas Rules of Civil Procedure, the maximum protections required by law: the right to take part in extensive discovery, to present testimony, to cross-examine all the State's witnesses, to present both written and oral argument to the Texas courts and provided with not just one, but two detailed opinions[9] addressing the parties' factual and legal disputes. Two separate Texas appellate courts have determined that the prospecting permit statutes do not apply to Permanent University Fund lands. *Allen* and *State v. Hollingsworth,* 784 S.W.2d 461 (Tex.App. - Austin 1989, writ denied). The Land Commissioner simply had no authority to issue prospecting permits for the lands at issue in this case. Because he was lacking in this authority, the Land Commissioner's refusal to accept Petitioner's Applications for filing was proper and did not constitute a violation of Petitioner Hollingsworth's due process rights. Petitioner and Respondents have been in agreement throughout these proceedings that Petitioner's Applications covered only university lands.

In summary, the relief Petitioner Hollingsworth requests from this Court is meaningless. In effect, Petitioner Hollingsworth is asking this Court to remand this cause to the Land Commissioner so that a formal administrative hearing can be held. If this Court were to grant such relief, the Land Commissioner would have no choice but to apply the law as construed by the two Texas courts of appeals in *Allen* and *State v. Hollingsworth* and again deny Petitioner Hollingsworth's Applications. Simply stated, Petitioner Hollingsworth is requesting this Court to do a useless thing. The Court should waste no time in denying this request.

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[9] See Appendix F (letter from Judge Hume Cofer dated September 15, 1988, to all counsel of record announcing his ruling in the case) and Appendix C to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 5-39).

C. The Texas Supreme Court Provided Petitioner Hollingsworth Due Process.

Petitioner Hollingsworth argues that the alleged "ex parte communication" to the Texas Supreme Court by Land Commissioner Mauro's November 30, 1990 letter[10] "rendered the court unable to afford Petitioner a fair and impartial hearing". As previously argued by Respondents at pages 2-8 of this brief, the well-settled law of the State of Texas clearly favors the trial court's and court of appeals' decisions in this matter, as well as the Texas Supreme Court's decision to uphold those lower courts' rulings regarding the validity of Petitioner Hollingsworth's Applications for Prospecting Permits. Contrary to Petitioner Hollingsworth's assertions, Land Commissioner Mauro's letter of November 30, 1990, could not and clearly did not, prejudice his rights. As pointed out by Land Commissioner Mauro in his subsequent letter to the Texas Supreme Court dated January 18, 1991[11] not only was the November 30, 1990 letter to that same court promptly sent to Petitioner's counsel of record at the time, Messrs. Broadus A. Spivey and Paul E. Knisely, but indeed, said counsel was informed of the content of said letter and of the Land Commissioner's intent to file the letter with the Texas Supreme Court before it was actually delivered to the Court. Further, Petitioner's arguments regarding the propriety or alleged prejudicial effect of Land Commissioner Mauro's November 30, 1990 letter were presented to the Texas Supreme Court in "Petitioner Hollingsworth's Motion to Sever and Motion for Rehearing."[12] In that motion, Petitioner Hollingsworth correctly pointed out to the Texas Supreme Court, as Land Commissioner Mauro had previously in his November 30,

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[10] See Appendix H to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 54-57.

[11] See Appendix I to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 59-61.

[12] See Appendix G, pages 3-7.

1990 letter, that the alleged fraudulent conveyances referred to by Land Commissioner Mauro in said letter were limited to Mr. Bryce E. Evans, the other Petitioner before the Texas Supreme Court, and that Petitioner Hollingsworth was not in any way implicated in any unlawful or questionable activity regarding the subject Applications. Petitioner Hollingsworth's Motion for Rehearing was overruled and his request for severance denied as they should have been, based on the well-settled law that Land Commissioner Mauro was unauthorized to issue prospecting permits on university lands. See *Allen* and the court of appeals' opinion below.

CONCLUSION

There is nothing in Petitioner Hollingsworth's petition meriting review. This appeal does not present a federal question. Respondent's suit in the trial court was a suit to remove cloud on title, and Petitioner Hollingsworth, who was represented by able counsel every step of the way through the Texas judicial system, was provided due process as required by law.

Respectfully submitted,

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APPENDIX A

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	§	201ST JUDICIAL DISTRICT

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION

With leave of Court, COME NOW, the State of Texas, the School Land Board, the Board for Lease of University Lands, the Board for Lease of the Department of Corrections, along with Garry Mauro, in his capacity as Commissioner of the School Land Board, Chairman of the Board for Lease of University Lands, and Chairman of the Board for for Lease of the Department of Corrections, Plaintiffs in the above-entitled and numbered cause, represented herein by Jim Mattox, Attorney General of the State of Texas, complaining of Bryce E. Evans and Gil Hollingsworth, Defendants, and for cause of action would show the Court as follows:

I.

Process has been previously served upon Defendants Bryce E. Evans and Gil Hollingsworth and answers and cross-actions have been filed in behalf of the Defendants.

II.

A. The Plaintiffs herein have authority to lease certain State lands and/or minerals under the following statutory enactments:

1. School Land Board - Tex. Nat. Res. Code §§ 32.001-32.111 and §§ 52.001 - 52.153 (Vernon 1978 and Vernon Supp. 1988)

2. University Board of Lease of University Land - Tex. Education Code §§ 66.61 - 66.80 (Vernon 1978 and Vernon Supp. 1988)

3. Department of Corrections - Tex. Nat. Res. Code §§ 34.001 - 34.185 (Vernon Supp. 1988)

The above-cited leasing statutes (or the predecessors) have provided the exclusive method of obtaining oil and gas leases on the lands at issue in this lawsuit for over fifty-five years.

B. Each of the Defendants in this case has purported to take steps to obtain permits to prospect and develop oil and gas on various tracts of land pursuant to Subchapter G of Chapter 52, Sections 52.221, et seq., of the Natural Resources Code. During January, 1983, Defendants caused to be recorded in the deed records of various counties in Texas, "Applications for Prospecting Permits" covering all the lands at issue in this cause. Copies of the applications are now in evidence before the Court in this cause. Defendants have filed such applications for prospecting permits on approximately 70,000 acres of Permanent University Fund land, 15,800 acres of Permanent School Fund land and 9,700 acres of Department of Correction land for a total of approximately 95,500 acres.

C. Defendants attempted to file the above-referenced applications with the General Land Office in January of 1983. Plaintiff Commissioner Mauro, through his authorized agents/representatives, rejected these filings and the letters evidencing such rejections are in evidence before the Court in this cause. Such rejections clearly reflect a final determination by Plaintiff Commissioner

Mauro that these applications have no force and effect under State of Texas law.

D. Plaintiffs would show that as a result of the filing of the "Applications for Prospecting Permits" by Defendants, Plaintiffs have either been unable to lease the above referenced lands for oil and gas purposes, or in those cases where any of such lands have been leased by the respective boards for lease, the lessees of such lands have refrained from carrying out drilling operations on such lands due to the cloud created on Plaintiffs' title by the above-referenced filings by Defendants.

E. Plaintiffs would further show that, as a matter of law and as stated in recent court decisions, the "Applications for Prospecting Permits" create no title or just claim to any interest in any of the lands covered by such applications in Defendants, and Defendants well know that fact. Further, Defendants well know that the filing of such applications in the deed records of the counties where the respective lands covered by the applications are located, has created a cloud on Plaintiffs' title to such lands, and such filings have indeed created a cloud on such title and should be removed by this Court.

III.

Alternatively, it is the purpose of this suit to seek a declaration from this Court regarding the obligations imposed upon Plaintiff Commissioner Mauro by Sections 52.221, et seq., Subchapter G, Chapter 52 of the Texas Natural Resources Code prior to their express repeal by the 68th Legislature of Texas on February 1, 1983.

A. Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code were general laws which were not applicable to Permanent School Fund Land, Permanent University Fund Land and Texas Department

of Corrections Land, which lands were then, and still are today, governed by separate specific statutes.

B. In the alternative, Plaintiff contends and seeks a declaration from this Court that such provisions of the Natural Resources code were without force and effect. The statutes from which those sections of the Natural Resources Code were purported to be derived had long previously been repealed. Such provisions of the Natural Resources Code were included in said Code by mistake or else to reflect the continuing rights of oil and gas leaseholders who had previously acquired their interest under valid permits. Those provisions of the Natural Resources Code were, therefore, without force and effect. Thus, Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code, were not valid and operable statutes for obtaining oil and gas prospecting permits, and oil and gas leases in conjunction therewith on Public Free School Land of the State of Texas, on Permanent University Fund Land and Texas Department of Corrections Land, but were null and void.

C. Alternatively, Sections 52.221, et seq. of Subchapter G, Chapter 52 of the Natural Resources Code were void and unconstitutional and in violation of Article III, Section 51, Article VII, Section 4, and Article VII, Section 12 of the Texas Constitution of 1876 as written and as applied.

D. Alternatively, Sections 52.221, et seq. of Subchapter G, Chapter 52 of the Natural Resources Code were void and unconstitutional because of being vague and indefinite.

E. Alternatively, if Sections 52.221, et seq., Subchapter G, Chapter 52, of the Natural Resources Code were otherwise valid and effective statutes, the repeal effective February 1, 1983, such provisions of the Natural Resources Code, abolished as of February 1, 1983, all pending applications for prospecting permits, prospecting

permits and the prospecting permit method of acquiring oil and gas leases on State Public Free School Land, Permanent University Fund Land and Texas Department of Corrections Land.

F. Alternatively, the prospecting permit leasing statutes, Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code, if otherwise effective statutes were repealed by implication on September 1, 1979, by Senate Bill 526, TEX.GEN. LAWS, Chapter 616, page 1377, insofar as lands belonging to the University of Texas Permanent University Funds are affected.

G. Alternatively, if Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code were effective laws of Texas, then, under Sections 52.001.-52.153, Sections 32.001-32.111, and other applicable sections of the Natural Resources Code, and Sections 66.61, et seq. of the Education Code, the Commissioner of the General Land Office, the School Land Board, the Board for Lease of University Lands, or the Board for Lease of the Texas Department of Corrections, in his or their discretion, could determine whether to lease for oil and gas under the sealed bid method and public auction method, or under the prospecting permit method. The Commissioner of the General Land Office, and the various state leasing boards have exercised their discretion and elected to lease for oil and gas development the lands here involved under the sealed bid method and the public auction method.

VI.

Plaintiff, Commissioner Mauro, has not evaluated any of the subject applications on their merits but rather has only refused to accept them for filing for the reasons stated above. Plaintiff Commissioner Mauro reserves the right to make the determinations contemplated by the relevant statutes if it is determined that he is obligated to accept some or all of the applications for filing.

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that this Court enter judgment declaring the Defendants' "Applications for Prospecting Permits" to be of no force effect, cancelling same, and removing the cloud on Plaintiffs' title cast by the filing of such applications.

In the alternative, and without waiving the foregoing, Plaintiffs prays that, upon final trial, this Court enter a declaratory judgment to effect that Sections 52.221, et seq. of the Natural Resources Code were general laws which did not apply to Permanent School Funds Land, Permanent University Fund Land and Texas Department of Corrections Land, and that such lands were then, and still are today, governed by separate specific statutes; or, alternatively, that Sections 52.221, et seq. of the Natural Resources Code were without force and effect; or, in the alternative, that no rights were created by such provisions with regard to any particular tract of land unless, and until, the School Land Board, the Board for Lease of University Lands, or other relevant leasing board, formally decided to make such tract of land available for leasing in that manner.

In the alternative, and without waiving the foregoing, Plaintiffs pray that this Court declare that no application filed with Plaintiff's Commissioner Mauro, after the effective date of the express repeal of Sections 52.221, et seq. of the Natural Resources Code need be considered by said Plaintiff for any purpose. Plaintiffs further pray that they be awarded cost of court, and such other and further relief as they may show themselves to be entitled to receive.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

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(Signed)
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Second Amended Original Petition was sent by Certified Mail, Return Receipt Requested, to Defendants Bryce E. Evans and Gil Hollingsworth, through their attorneys of record, Ronald O. Holman, Cippelle, Taylor, Holman & Robertson, 5949 Sherry Land, Suite 1135, Dalls, Texas 75225 on this the 20th day of April, 1988,.

(Signed)
JOSE MANUEL RANGEL

APPENDIX B

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	)	IN THE DISTRICT COURT OF
VS.	)	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	)	201ST JUDICIAL DISTRICT

SUPPLEMENTAL ANSWER OF DEFENDANTS' BRYCE E. EVANS AND GILL HOLLINGSWORTH

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRYCE E. EVANS and GIL HOLLINGSWORTH (hereinafter referred to collectively as "Defendants") and file this their Supplemental Answer and would show this Honorable Court as follows:

I.

Defendants would show the Court that Garry Mauro, Commissioner of the General Land Office, has failed to make a final decision concerning the validity and effect of the "Applications for Prospecting Permits" filed by the Defendants as well as the rights of the Defendants to obtain oil and gas prospectors permits (and oil and gas leases in conjunction therewith) on Permanent School Fund, Permanent University Fund and Texas Department of Corrections Lands. Defendants would further show that such Applications are still pending before Garry Mauro, Commissioner of the General Land Office as he has merely refused to accept such Applications. At the time such Applications were tendered to the General Land Office, Garry Mauro, Commissioner of the General Land Office, by and through his agents and/or representatives, rejected

the filings and confirmed such rejections in writing by presenting a letter to Defendants herein. The General Land Office has never accepted such Applications for filing. The General Land Office has never evaluated any of the subject Applications on their merits as required by Chapter 52, *Permits and Leases,* Sections 52.221, et seq., of the Natural Resources Code. Therefore, in the alternative, Defendants would show that the Commissioner of the General Land Office has not made a final decision which determines the rights of the Defendants pursuant to Chapter 52, Sections 52.221 et seq., of the Natural Resources Code.

WHEREFORE, PREMISES CONSIDERED, Defendant pray that this Court enter a Declaratory Judgment stating as follows:

1. The District Court lacks primary jurisdiction to hear this matter and the case should be dismissed;

2. Alternatively, Sections 52.221 et seq., of the Natural Resources Code were valid and in full force and effect and the Commissioner of the General Land Office should issue prospecting permits to the Defendants on each tract of land for which they filed an Application;

3. In the further alternative, Sections 52.221 et seq., of the Natural Resources Code were valid and in full force and effect and the Commissioner of the General Land Office should issue prospecting permits to Defendant Bryce E. Evans on all Texas Department of Corrections land;

4. For such other and further relief, at law or in equity, to which Defendants may show themselves justly entitled.

Respectfully submitted,

CIPPELE, TAYLOR, HOLMAN
& ROBERTSON

By (Signed)
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed by certified mail, return receipt requested or hand delivered, or federal expressed to Mr. Jose Manuel Rangel, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, Attorney for Plaintiff, on the 25th day of April, 1988.

(Signed)
Ronald O. Holman

APPENDIX C

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	§	201ST JUDICIAL DISTRICT

WRITTEN ARGUMENTS OF DEFENDANT, GIL HOLLINGSWORTH

COMES NOW Gil Hollingsworth, Defendant in the above-referenced cause and file these written arguments pursuant to this Court's letter dated March 9, 1988 and would show this Honorable Court as follows:

I.

Plaintiff, Garry Mauro, Commissioner of the General Land Office, has submitted this controversy to the jurisdiction of this Court by filing this lawsuit asking for declaratory relief rather than by handling the matter as a contested case under the Administrative Procedure and Texas Register Act (Article 6252-13a 13, V.A.T.S.). Therefore, this case is ripe for judicial consideration. The Courts of this State have declared that it is the duty of the trial courts to make the Uniform Declaratory Judgment Act and § 12 of the Administrative Procedure and Texas Register Act useful tools in the resolution of legal problems and controversies, regardless of which statutory provision is used. If a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue. *Bellegie v. Texas*

Board of Nurse Examiners, 685 S.W.2d 431, 434 (Tex.App. 1985, no writ). *Public Utility Commission of Texas, et al. v. City of Austin,* 728 S.W.2d 907 (Tex.App. — Austin 1987).

The evidence is undisputed that this Defendant followed the provisions of Subchapter G. of Chapter 52, Permits and Leases, Sections 52.221, et seq. of the Natural Resources Code as those sections affect his right to obtain oil and gas prospector's permits and oil and gas leases in conjunction therewith. After the prospecting permits were filed with the Commissioner in a timely manner, this lawsuit was filed. The Commissioner chose to file this lawsuit for a declaratory judgment rather than handling the applications as a contested case under § 13 of the Administrative Procedure and Texas Register Act (APTRA). For the Plaintiff to argue compliance with the notice, hearing and other procedures of § 13 of the APTRA is to make a sham and mockery of the purpose enunciated in the first section of the Act. Due to no fault of his own, this Defendant did not have a chance to be heard, let alone exhaust his remedies under the Act. Five years have passed since the filing of his applications. This Court has the power to resolve this issue and should declare that the Land Commissioner issue said permits to Defendant without delay.

WHEREFORE, PREMISES CONSIDERED, this Defendant prays this Honorable Court enter a declaratory judgment stating that this Court has jurisdiction to hear this matter and that the Commissioner of the General Land Office should issue oil and gas prospecting permits to this Defendant on each tract of land on which he filed an application.

Respectfully submitted,

TOM SAWYER
2209 Hopi Trail
Austin, TX 78703
512/477-7559

ATTORNEY FOR GIL HOLLINGSWORTH

By (SIGNED)
Tom Sawyer
State Bar No. 17694500

APPENDIX D

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	X X X X X	IN THE DISTRICT COURT OF
VS.	X X	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	X X X	201ST JUDICIAL DISTRICT

DEFENDANT'S FIRST MOTION FOR CONTINUANCE

COME NOW, Defendants, and makes this their first verified motion for continuance and say that they cannot go to trial in this case at its present setting, and in support thereof shows:

I.

The Defendants in this case, Bryce Evans and Gil Hollingsworth, has purported to take steps to obtain permits to prospect and develop oil and gas on over 100 tracts of land pursuant to Subchapter G of Chapter 52, Sections 52.221, et seq., of the Texas Natural Resources Code. It is the purpose of this suit to seek a declaration from this Court regarding the obligations imposed upon Plaintiff by those statutory provisions prior to their express repeal in 1983.

II.

Plaintiff and Defendants Bryce Evans and Gil Hollingsworth had until just recently agreed to abate all discovery in this suit pending the entering of final judgment in a companion case to the subject lawsuit involving identical

issues, styled: Jacqueline W. Allen and C. Ray Allen vs. Garry Mauro, Commissioner of the General Land Office, Cause No. B-32,417, in the 238th Judicial District Court of Midland County, Texas. The companion case has already been tried in the District Court and appealed to both the Court of Appeals, Eighth Supreme Judicial District of Texas, and the Supreme Court of Texas. The Supreme Court recently refused the Allen's Application For Writ of Error, with the notation n.r.e., and on August 7, 1987 the Court of Appeals issued mandate to the trial court.

III.

The Defendants recently requested Certificates of Fact from the Plaintiff for each tract of land that they have applied for a permit on, for use at the trial in this suit. Plaintiff estimated that it would take a minimum of 30 days, but more than likely as long as 3 months to prepare such Certificates of Facts. *See* Motion for Continuance previously filed by Plaintiff and granted by the Court.

IV.

Plaintiff has advised Defendants that the costs to prepare a Certificate of Facts for each tract of land would be prohibitive. Plaintiff has proposed to prepare a Stipulation setting forth the status of title to each tract of land with the opportunity for Defendants, or their counsel, to review and verify same. To date, the Stipulation has not been completed by Plaintiff and Defendants have not had an opportunity to review or verify same. On November 4, 1987, Defendants received from Plaintiff by federal express information relating to the ownership of tracts of land at issue in the lawsuit. A true and correct copy of the Plaintiff's cover letter is attached hereto, marked Exhibit "A" and is made a part hereof for all purposes. Such letter states that Plaintiff was enclosing a copy of its First Amended Original Petition; however, Defendants did not receive a copy of same and do not have any idea what amendments or new

and additional causes of action have been alleged by the Plaintiff. Defendants have not had and will not have sufficient time to check with the General Land Office to verify the ownership in order that a Stipulation by the parties can be prepared and filed with the Court. Once a Stipulation has been agreed to by counsel for Plaintiff and Defendants, and filed with the Court the issues will be narrowed and the case can be disposed of by summary judgment. It is anticipated that an agreed Stipulation can be prepared and filed with the Court within 60 days.

V.

Counsel for Plaintiff has not agreed to this continuance.

VI.

This continuance is not sought for delay, but so that justice may be done.

WHEREFORE Defendants request that the above-entitled and numbered cause be removed from its present setting and not be reset for 60 days.

Respectfully submitted,

CIPPELE, TAYLOR,
HOLMAN & ROBERTSON
5949 Sherry Lane, Suite 1135
Dallas, Texas 75225
(214/361-9494)

By (Signed)
Ronald O. Holman
State Bar Card No.: 09903600

ATTORNEYS FOR DEFENDANTS,
BRYCE E. EVANS AND
GIL HOLLINGSWORTH

VERIFICATION

STATE OF TEXAS §

§

COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appears RONALD O. HOLMAN, who by me duly sworn on his oath deposed and said that he is duly qualified in all respects to make this verification, that he has read the above and foregoing Defendants' First Motion for Continuance, and that every statement contained therein is within his personal knowledge and true and correct.

(Signed)
RONALD O. HOLMAN

SUBSCRIBED AND SWORN TO BEFORE ME on this the 4th day of November, 1987, to certify which witness my hand and official seal.

(S E A L)

(Signed)
Notary Public in and for
the State of Texas

My Commission Expires:
11/05/90

Lee Ann Royer
(Print/Type Notary Name)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has this 4th day of November, 1987, been mailed by certified mail, return receipt requested to all counsel of record.

(Signed)_____
Ronald O. Holman

APPENDIX E

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	)	IN THE DISTRICT COURT OF
VS	)	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS GIL HOLLINGSWORTH	)	201ST JUDICIAL DISTRICT

before
Hon. Hume Cofer, Judge Presiding

STATEMENT OF FACT

On the 15th day of December, 1987, in the 201st Judicial District Court of Travis County, Texas, a trial was commenced in the above-styled and numbered cause, whereupon the following proceedings were had and the following evidence introduced:

APPEARANCES:

JIM MATTOX, Attorney General of Texas, by Mr. Jose Manuel Rangel, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548
appearing on behalf of Plaintiffs;

CIPPELE, TAYLOR, HOLMAN & ROBERTSON, by Mr. Ronald O. Holman, 5949 Sherry Lane, Suite 1135 Dallas, Texas 75225
appearing on behalf of Defendants.

PAGE 13/LINE 21 THROUGH PAGE 14/LINE 16

MR. HOLMAN: . . . .

There is a companion case, which is the *Allen* case, which counsel for plaintiff has presented to you, which has ruled in part on some of the land that is the subject of this lawsuit. Those are two types of lands, lands, owned or dedicated to the University of Texas, and secondly land dedicated to the permanent school fund.

Some of the applications that we will introduce into evidence cover University of Texas land and permanent school fund lands. However, the distinction in this case factually from the distinction in the *Allen* case is we have land that is not owned by the State of Texas as permanent school fund land or by the University of Texas as public school land, but is rather owned by a state agency which is a Department of Corrections land. Then we also have a fourth category of land, which is land on Matagorda Island.

Neither land covered on Maragorda Island nor land owned by the Texas Department of Corrections was covered by the prior opinion. . . .

APPENDIX F

September 15, 1988

Mr. Jose Manuel Rangel
Assistant Attorney General
Energy Division
P. O. Box 12548
Austin, Texas 78711-2548

Mr. Ronald O. Holman
5949 Sherry Lane, Suite 1135
Dallas, Texas 75225

Mr. Tom Sawyer
2209 Hopi Trial
Austin, Texas 78703

Mr. Benny J. Lowe
3108 North Big Spring, Suite 105
Midland, Texas 79701

Re: Mauro v. Evans and Hollingsworth,
No. 344, 540-A

Gentlemen:

Plaintiffs' amended petition seeking to clear the title to the land in question changes the nature of this case. My March 9, 1988 decision that the parties were seeking an advisory decision would not be proper in this case as it is now pleaded.

I concluded that *Allen v. Mauro* correctly states the applicable law and that the principle of that decision applies also to the Texas Department of Corrections land. The statute relied on by defendants and the statutes under which school, University, and TDC land has been leased can be and should be reconciled as stated by *Allen v. Mauro.* The Commissioner acted correctly when he refused to accept defendants' applications.

Judgment will be rendered for plaintiff cancelling the Applications filed in each County and removing the cloud on plaintiffs' title resulting from the filing of such applications. Judgment will also be rendered that plaintiffs and defendants take nothing by their respective actions for declaratory judgment.

The Attorney General should draft the judgment and submit it to opposing counsel. The judgment should only state the result. Conclusions of law will be stated separately if they are requested. As indicated above, they will be based on the opinion in *Allen v. Mauro.*

About 10 days after the Attorney General submits a draft of the judgment to opposing counsel, I will sign the judgment if it is in proper form and if I am not advised of any objection to the draft submitted by the Attorney General.

Very truly yours,

SIGNED

HUME COFER

Judge, 98th District Court

Travis County, Texas

HC/ca

APPENDIX G

NO. C-9715

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

GIL HOLLINGSWORTH,

Petitioner

VS.

GARRY MAURO,
IN HIS CAPACITIES AS COMMISSIONER OF THE GENERAL LAND OFFICE AND CHAIRMAN OF THE SCHOOL LAND BOARD, THE BOARD FOR LEASE OF UNIVERSITY LANDS AND THE BOARD FOR LEASE OF THE DEPARTMENT OF CORRECTIONS; THE STATE OF TEXAS; THE SCHOOL LAND BOARD; THE BOARD FOR LEASE OF UNIVERSITY LANDS; AND, THE BOARD FOR LEASE OF THE DEPARTMENT OF CORRECTIONS,

Respondents

PETITIONER HOLLINGSWORTH'S MOTION TO SEVER AND MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW Gil Hollingsworth, Petitioner in this cause, and files this his Motion to Sever and Motion for Rehearing, urging the Court to vacate and set aside its order denying Petitioner's Application for Writ of Error rendered on December 5, 1990; to grant Petitioner's Motion to Sever his claims from those of Petitioner Bryce Evans; and to grant a rehearing of the merits of Petitioner's appeal from the judgment rendered against him by the courts below. In support of this Motion to Sever and Motion for

Rehearing, Petitioner would respectfully show the Supreme Court as follows:

STATEMENT OF POINTS OF ERROR

POINT OF ERROR NUMBER ONE

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE TRIAL COURT ERRED IN FAILING AND REFUSING TO DISMISS OR STAY THIS LAWSUIT FOR LACK OF JURISDICTION, BECAUSE THE PLAINTIFF COMMISSIONER OF THE GENERAL LAND OFFICE DID NOT COMPLY WITH THE HEARING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE AND TEXAS REGISTER ACT (APTRA), AND DID NOT MAKE A "FINAL DECISION" UNDER APTRA AS TO THE MERITS OF PETITIONER'S OIL AND GAS PROSPECTING PERMIT APPLICATIONS, AND SUCH A DECISION IS REQUIRED BEFORE JURISDICTION WILL LIE WITH THE DISTRICT COURT. (TR 420; Supp. TR 2; opinion of the court of appeals)

POINT OF ERROR NUMBER TWO

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT AS A MATTER OF LAW, THE FAILURE BY THE PLAINTIFF COMMISSIONER OF THE GENERAL LAND OFFICE TO COMPLY WITH THE HEARING REQUIREMENTS OF APTRA DEPRIVED APPELLANTS OF DUE PROCESS OF LAW.

POINT OF ERROR NUMBER THREE

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S JUDGMENT THAT PETITIONER'S APPLICATIONS FOR OIL AND GAS PROSPECTING PERMITS ARE NULL AND VOID, BECAUSE AS A MAT-

TER OF LAW SUBCHAPTER G OF CHAPTER 52 OF THE NATURAL RESOURCES CODE WAS VALID, ENFORCEABLE, AND APPLICABLE TO THE LANDS FOR WHICH PETITIONER SOUGHT PERMIT, AND THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT PETITIONER COMPLIED WITH ALL THE STATUTORY REQUIREMENTS FOR THE MANDATORY ISSUANCE OF SUCH PERMITS BY THE COMMISSIONER OF THE GENERAL LAND OFFICE. (TR 420; Supp. TR 2; opinion of court of appeals)

POINT OF ERROR NUMBER FOUR

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE COMMISSIONER OF THE GENERAL LAND OFFICE IS ESTOPPED AS A MATTER OF LAW FROM REFUSING TO FILE PETITIONER'S APPLICATIONS FOR OIL AND GAS PROSPECTING PERMITS AND FROM REFUSING TO ISSUE SUCH PERMITS TO PETITIONER, BECAUSE THE ONLY REASON THAT WAS STATED TO PETITIONER AT THE TIME OF THE REFUSAL WAS THAT SUBCHAPTER G WAS "INVALID," AND AS A MATTER OF LAW THAT WAS INCORRECT AND DID NOT CONSTITUTE A LAWFUL BASIS FOR THE REFUSAL. (TR 420; Supp. TR 2; opinion of court of appeals)

ARGUMENT AND AUTHORITIES PERTINENT TO ALL POINTS OF ERROR IN PETITIONER'S MOTION TO SEVER AND MOTION FOR REHEARING

I. MOTION TO SEVER AND REHEAR PETITIONER HOLLINGSWORTH'S APPLICATION

A. Commissioner Mauro's Letter to This Court Was Improper and Prejudicial

Petitioner Hollingsworth urges this Court to reconsider its denial of his Application for Writ of Error particularly in light of the highly improper and prejudicial letter sent to this Court by Respondent Garry Mauro, Commissioner of the General Land Office, on November 30, 1990, and this Court's subsequent denial of Petitioner's Writ just six days later, on December 5, 1990. (Commissioner Mauro's letter is attached as Appendix A)

Commissioner Mauro wrote the Court allegedly out of concern for investors who apparently have purchased interests in the prospecting claims in dispute in this case from Petitioner Bryce Evans. Such a personal, blatantly prejudicial communication with the court by a party represented by counsel is completely improper, a fact of which Commissioner Mauro, himself a lawyer, should be well aware. Furthermore, the facts which he alleges in his letter are outside the record in this case and are unsubstantiated by any evidence. Finally, even assuming the accusations of wrongdoing which Commissioner Mauro has leveled against Mr. Evans to be true, there have been no such accusations made against Mr. Hollingsworth, nor even any insinuation or hint of impropriety on his part in pursuing his legitimate permit claims under Subchapter G of Chapter 52 of the Natural Resources Code. Mr. Hollingsworth is guilty only of attempting to enforce his rights under the laws of the State of Texas, and it is difficult to avoid the conclusion that those rights have been severely and unfairly prejudiced by Commissioner Mauro's letter.

Texas law is clear: "Any person may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." TEX.R.CIV.PRO.7 (emphasis added). As the word "or" in this rule makes clear, the right to represent oneself and the right to representation by an attorney are mutually exclusive alternatives:

> A party who appears by counsel has no right to personally conduct, or assist in conducting,

> litigation of his own case. ... [A] party has no right to hybrid representation.

In re Moody, 105 Bankr. 368 (S.D. Tex. 1989)(emphasis added). In the *Moody* case, the court ordered all papers filed by the defendant before he informed the court that he had discharged his attorney and would be proceeding pro se to be stricken from the record.

Commissioner Mauro and the other Respondents are represented by the Attorney General of the State of Texas and have been throughout the entire course of this dispute. For Commissioner Mauro to take it upon himself, at this late stage of the litigation, to "bring[]... special circumstances and concerns to the Court's attention," circumstances and concerns entirely outside the record in the case, constitutes a flagrant violation of the rule against hybrid representation. As a lawyer Commissioner Mauro ought to be aware of the prohibition against such informal, personal pleas to the court: Texas disciplinary Rule of Professional Conduct 3.05(a) forbids a lawyer to "seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure."

Putting aside the impropriety of Commissioner Mauro's even sending such a letter, his submission for the Court's consideration of alleged facts never before presented in this case violates basic procedural and evidentiary rules. Texas Rule of Appellate Procedure 50(a) states that "[t]he record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts." As the El Paso court has put it, "The duty of [appellate courts] is to consider only the testimony adduced and/or the evidence admitted at the time of trial on which the judgment of the trial Court is based." *Gulf Oil Corp. v. Southland Royalty Co.,* 478 S.W.2d 583, 591 (Tex. Civ. App. — El Paso 1972), aff'd 496 S.W.2d 547 (1973). Clearly this does not include a letter, sent to the Court by a party represented by counsel eight months after the Application for Writ of Error was

filed, alleging facts wholly outside the record in the case. Petitioner's Application for Writ of Error had been on file for eight months when Commissioner Mauro sent his November 30, 1990 letter. Six days (three business days) later, the Court denied the Writ. Since it did so without an accompanying opinion, Petitioner has no way of knowing the basis or bases for its decision. But Petitioner would urge that the denial, coming so quickly on the heels of Commissioner Mauro's letter, creates the strong impression that the Court's decision was influenced by if not in direct response to, the letter. Given the impropriety of both the submission and contents of the letter, the Court should correct that impression by granting Petitioner's Motion for Rehearing.

B. Petitioner Hollingsworth's Application Should Be Severed and Addressed on Its Own Merits

Assuming for the sake of argument only that Commissioner Mauro's letter properly was before this Court, the serious accusations made by Commissioner Mauro against Mr. Evans clearly were extremely prejudicial to the claims of Mr. Hollingsworth, who is not accused of, and is not guilty of, any wrongdoing whatsoever. Counsel for Mr. Hollingsworth no longer represents Mr. Evans, and Mr. Hollingsworth is not associated with him in any way, other than having filed similar permit leasing claims shortly before the repeal of Subchapter G and having been made common defendants in Commissioner Mauro's lawsuit.

Petitioner Hollingsworth is entitled to have this Court consider his claims on the merits, uninfluenced by improper communications with the Court or accusations outside the record against his former co-Petitioner. It is difficult in light of Commissioner Mauro's and the Court's actions, to believe that he has received the due process he is entitled to — either at the General Land Office, or now in the court system. Petitioner Hollingsworth therefore

requests that the Court sever his claims from those of Petitioner Evans for separate consideration on the merits.

II. THE MERITS OF PETITIONER HOLLINGSWORTH'S CLAIMS HAVE BEEN DISREGARDED TO PROTECT THE STATE FROM A "MISTAKEN" STATUTE

A. The Statutory Construction Issues

Petitioner Hollingsworth will not repeat all of his arguments and authorities which mandate the reversal of the lower courts' strained reasoning and unsupportable rulings in favor of the State of Texas in this case. The main points, however, merit reiteration.

The lower courts' decisions to deny either a mandatory statutory remedy or even an administrative hearing to Petitioner Hollingsworth obviously reflect an understandable concern for protecting the State of Texas from the discomfort of having to live up to what was a supposedly "mistaken" legislative enactment, i.e., the 1977 re-enactment of the permit leasing statutes in Subchapter G. The court of appeals' reasoning in support of its decision, however — no matter how sophisticated it may appear superficially — disregards the unambiguous statutory language in Subchapter C and the applicable rules of statutory construction.

The first part of the opinion of the court of appeals correctly describes the nature of the parties' dispute, and also notes, correctly, that Subchapter G, by its express terms, did apply to university and public school lands.

The court of appeals's opinion, however, then proceeds to disregard these clear indications of legislative intent, never explaining how or why it does so. The opinion's lengthy discussion of earlier laws governing leasing of state lands overlooks the fact that the 1977 enactment of

Subchapter G (along with the other provisions of Chapter 52 and the remainder of the Code) was subsequent to all the other leasing statutes referred to, and that by its terms (as the court of appeals initially recognized) Subchapter G clearly included the lands on which Mr. Hollingsworth — in reliance on the law as enacted — filed permit applications. Compare *Duval Corp. v. Sadler*, 4067 S.W.2d 493, 497 (Tex. 1966)(discussed in Petitioner's letter brief to this Court on August 31, 1990.)

While the provisions of the prior statutes may bear on the correct construction that should be applied to Subchapter G, the court of appeals erroneously attempted to selectively impose isolated provisions of such long-repealed statutes onto the 1977 Code provisions. The result is a flawed analysis, as on page 6 of the court's opinion, where it states that:

> The permit system of Subchapter G is absolutely inconsistent with the competitive-bid system established in the subsequent legislation mentioned above [i.e., the legislation creating boards for lease of various state lands]. After university lands, public school lands, and lands belonging to the Department of Corrections were explicitly made the subject of competitive bidding, no later enactment ever placed such lands back within the scope of the statutes that became Subchapter G.

This reasoning begs the question because Subchapter G is itself such a "later enactment." There were no existing statutes "that became Subchapter G" because the earlier permit-leasing statutes had long since been repealed. As the court of appeals expressly notes elsewhere in its opinion, the Legislature in 1931 unqualifiedly repealed Article 5538 in its entirety. (See page 9 of the Court's opinion, discussing 1931 Tex.Gen.Laws, ch. 271, 13). As a result, the

1977 enactment of Subchapter G was a new statute, not an "amendment" to an existing Article 5538.

Therefore, if the court of appeals is correct that the permit-leasing system of Subchapter G is "absolutely inconsistent" with the competitive-bid statutes, then the later 1977 enactment must be controlling.

The Code Construction Act, in TEX.GOVT.CODE § 311.025, provides that "if statutes enacted at the same or different sessions of the Legislature are irreconcilable, the statute latest in date of enactment prevails." (emphasis added)

Even if a "general/special" analysis is applied, the Code Construction Act, in TEX.GOVT.CODE § 311.026(a), requires that "[i]f a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both." The court of appeals does not explain why it is not possible to give effect to both the permit-leasing provisions and the competitive-bid provisions in this case, which when read together, merely created alternative methods of leasing State lands during the period from 1977 to 1983, at least where the tracts of land in question were not leased and were not in the competitive-bid process at the time Petitioner Hollingsworth filed his permit applications.

Section 311.026(b) of the Code Construction Act further provides that "[i]f the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail." As the court of appeals noted on page 5 of its opinion, the legislature clearly manifested its intent in TEX.NAT.RES.CODE §52.241 that Subchapter G did apply to university and public school lands. Thus, even if the "general" permit-leasing statutes enacted in 1977 con-

flicted irreconcilably with the "special" earlier-enacted competitive-bid statutes, then the later-enacted provision must prevail.

The opinion of the court of appeals further fails to address the constitutional prohibition, set forth in TEX.CONST. art. 3, §56, against the enactment of "any local or special law" regulating the raising of money for public schools, or any other "local or special law" in cases where a "general law can be made applicable" (emphasis added). Further, the court of appeals does not explain or resolve the peculiar result that if Subchapter G did not apply to any lands otherwise subject to a competitive-bid process, then it did not apply to any state lands, and it would thereby be rendered totally meaningless, contrary to the mandate of TEX.GOVT.CODE §311.021(2) ("In enacting a statute, it is presumed that...the entire statute in intended to be effective.").

In summary, the court of appeals has disregarded what the court itself recognizes as the unambiguous language of Subchapter G providing for permit leasing of the lands in question, and has also failed to apply the controlling rules of statutory construction, in order to arrive at a result which will protect the State of Texas from having to issue prospecting permits to Mr. Hollingsworth (and Mr. Evans). It is not the role of the courts to protect the State from unwise, wrongheaded, or even supposedly "mistaken" actions by the Legislature. See *American Indemnity Co. v. City of Austin,* 246 S.W. 1019 (Tex. 1922); *Waters v. Gunn,* 218 S.W.2d 235 (Tex.Civ.App. — Amarillo 1949, writ ref'd n.r.e.); *Criminal District Attorney, Tyler County v. Commissioner's Court of Tyler County,* 753 S.W.2d 514 (Tex.App. — Beaumont 1988, writ denied).

In this case in particular, the courts need not attempt to undo or construe away the effect of clear statutory language. The Legislature itself properly acted in 1983 to repeal what it had enacted in 1977 — but the vested rights

of Petitioner Hollingsworth could not thereby be divested. See TEX.GOVT.CODE § 311.031(a)(1) ("the...repeal of a statute does not affect...the prior operation of the statute or any prior action taken under it").

This Court should apply and enforce the statutory law as it was enacted in 1977, and should not attempt to rewrite the law to suit the desires of the State or its officers who do not want to abide by its terms. The judgments of the court below should be reversed; Subchapter G should be declared valid and applicable to the tracts of surveyed state land in question at the time Petitioner filed his permit applications; and the Commissioner of the General Land Office should be directed to comply with the mandatory directive of the law to issue permits to Petitioner to explore for oil and gas on those tracts.

B. Estoppel

The Commissioner and the State are estopped from relying on any grounds for the refusal to issue the permits other than that Subchapter G was "invalid," because that was the only alleged ground stated in the General Land Office's letters to Petitioner when his applications were refused in early 1983. Not until after the El Paso Court of APpeals specifically held in *Allen v. Mauro,* 733 S.W.2d 228 (Tex.App. — El Paso 1986, writ ref'd. n.r.e.), that Subchapter G was valid, did the Commissioner then claim that other grounds existed for rejecting Petitioner's permit applications.

The Austin Court of Appeals, like the El Paso court, has now held that Subchapter G was valid, but, like the El Paso court, has further held that it did not apply to the lands in question (nor, apparently, to any sate lands). Unlike the permit-seekers in the *Allen* case, however, Petitioner here has raised the estoppel doctrine to preclude the State and the Commissioner from changing their position years after the fact of refusal.

Once a State agency has stated a basis for its action or refusal to act in a proprietary matter, or has taken a position on which citizens involved in a proprietary dispute with the State agency have relied, the State is estopped from adopting a new, different, or inconsistent position to try to avoid the effect of its prior position. See *City of Corpus Christi v. Gregg*, 289 S.W.2d 746, 750-53 (Tex. 1956); *State v. Bryan*, 210 S.W.2d 455, 464 (Tex.Civ.App.—Austin 1948, writ ref'd n.r.e.); *Glasscock v. Permian Oil Co.*, 185 S.W.2d 740 (Tex.Civ.App. — El Paso 1944, writ ref'd w.o.m.); *Clear Lake City Water Authority v. Winograd*, 695 S.W.2d 632 (Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Since no other basis for refusing to accept Petitioner's permit applications was given, and since the Commissioner himself initiated this lawsuit on the sole premise that Subchapter G was "invalid," the Court should hold that he and the State are estopped from relying on any other grounds to deny the permits - - and should hold that the permits must therefore be issued to Petitioner.

C. Jurisdiction: Failure To Comply With APTRA

As Petitioner has previously pointed out, it was improper for Commissioner Mauro and the General Land Office to refuse to accept Petitioner's permit applications and to then immediately file a declaratory judgment suit in an attempt to have the courts declare Subchapter G invalid or unconstitutional. The courts have no jurisdiction or authority to give advisory opinions on factual, legal, or even constitutional questions when such issues arise in contested matters committed by the Legislature to initial determination by the administrative agency concerned. See *Short v. W. T. Carter & Brother*, 126 S.W.2d 953, 962 (Tex. 1938) (courts have no jurisdiction to decide issues concerning compliance with leasing statutes until Land Commissioner makes primary determinations as to whether the lands applied for fall within the terms of the statute

and whether the applications are in order); *Jester Development Corp. v. Travis County Appraisal District,* 775 S.W.2d 464 (Tex.App. — Austin 1989, no writ hist.) (courts have no jurisdiction to give advisory opinions on constitutional questions not addressed by the agency in the first instance).

Respondents' contention that this is a cloud-on-title or trespass-to-try-title case is itself nothing more than a smokescreen. The main issue in this case, as the court of appeals recognized, is whether Subchapter G of Chapter 52 of the Natural Resources Code was valid, enforceable and applicable to the lands for which Petitioner sought permits. While a lawsuit to determine the effect of claims on state lands may be available in some instances, it must be brought pursuant to the governing statutes. For instance, Section 11.077 of the Natural Resources Code provides:

> If any public land is held, occupied, or claimed adversely to the state or to any fund of the state by any person or if land is forfeited to the state for any reason, the attorney general shall file suit for the land, for rent on the land, and to recover damages to the land.

This provision, like all other Code provisions, must be construed and enforced in its statutory context, not in isolation.

Since the Revisor's Note to Section 1.002 of the Natural Resources Code states that the Code is subject to the requirements of the Administrative Procedures and Texas Register Act (APTRA), TEX.REV.CIV.STAT.ANN. art. 6252-13a, the Commissioner of the General Land Office clearly is obligated to comply with the Act with regard to this dispute before bringing an alleged "title" suit.

Under the provisions of APTRA, the Commissioner was required to set this matter for a hearing as a "contested

case" where all factual and legal issues could be heard and fully addressed. See art. 6252-13a §§ 3, 13. Until such a procedure is completed, with a "final decision" based on specific findings of fact and conclusions of law, the courts do not have jurisdiction to review or decide the issues in dispute in this case. See art. 6252-13a § 16. See also *Logan v. Armstrong,* 694 S.W.2d 68 (Tex.App. — Corpus Christi 1985, no writ).

This Court very recently held that the failure of a trial court to permit discovery or to grant a continuance, prior to a sudden venue hearing, deprived a litigant if its "fundamental due process right to notice and a hearing." *Union Carbide Corp. v. Moye,* 34 Tx.S.Ct.J. 111, 113 (Tex., Nov. 21, 1990). The APTRA procedural requirements are specifically designed to prevent such a deprivation in contested administrative disputes. This Court should at least remand this case to the General Land Office to comply with APTRA.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Hollingsworth prays:

(1) that the Court grant Petitioner's Motion to sever his claims from those of Petitioner Evans; and

(2) that the Court grant Petitioner's Motion for Rehearing, and upon rehearing, that the Court grant Petitioner's Application for Writ of Error; and

(3) that the Court reverse the judgment of the trial court and declare that the applications for prospecting permits filed by Petitioner are valid and effective and that Commissioner Mauro should issue permits to Petitioner pursuant to the provisions of subchapter G; or

(4) in the alternative, that the Court reverse the judgments of the lower courts and order that this lawsuit be stayed or abated for lack of jurisdiction, or in the alternative remanded to the General Land Office, so that the requirements of the Administrative Procedure and Texas Register Act can be fully complied with by Commissioner Mauro and the General Land Office.

Respectively submitted,

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SUPREME COURT, U.S.
MAY 16 1991
OFFICE OF THE CLERK

No. 90-1534

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GIL HOLLINGSWORTH,

Petitioner,

v.

TEXAS, ET AL.,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gil Hollingsworth,
Pro Se

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Midland, Texas 79702
915-699-0511

QUESTIONS PRESENTED

Can a judgment obtained without due process of law be valid and enforceable?

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Petitioner Hollingsworth submits this reply to brief in opposition to writ of certiorari.

STATEMENT OF THE CASE

Petitioner Hollingsworth was not afforded an administrative hearing before the General Land Office of the

State of Texas prior to the filing of the instant lawsuit.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS FEDERAL QUESTIONS.

Petitioner Hollingsworth was not afforded due process of law as required by the Fifth and Fourteenth Amendments of the United States Constitution and the Texas Constitution by not giving petitioner a hearing as provided by statute (APTRA § 6252-13a, Section 13.(a)).

B. JURISDICTION

The trial court, The Third Court of Appeals of Texas, and the Supreme Court of Texas lack jurisdiction to even hear this matter until an administrative hearing is held in this instant case. Jurisdiction cannot be waived and according to a recent Texas Supreme Court Case (Pan American Life Insurance Company v. Erbauer Construction Company,

Tex 1991, 791 S.W.2d 146) jurisdiction can be raised on appeal.

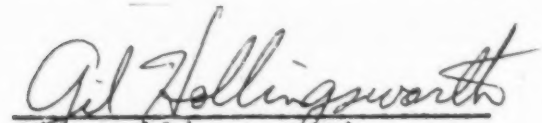
Even if jurisdiction is ultimately a question of law or one of statutory construction it should be submitted to the agency for the initial decision of the question of jurisdiction. Arguments for and against jurisdiction over a matter should be evaluated by the agency having responsibility for operating the statutory machinery (J. M. Huber Corporation v. Denman 367 F.2d 104.)

CONCLUSION

Petitioner has no control over the fact that respondents started out of the wrong gate in this instant case. Petitioner is due a hearing before the General Land Office of the State of Texas. Simply stated, Respondents cannot get to where they want to be from where they started. For the foregoing

reasons, a writ of certiorari should be granted.

Respectfully submitted,



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